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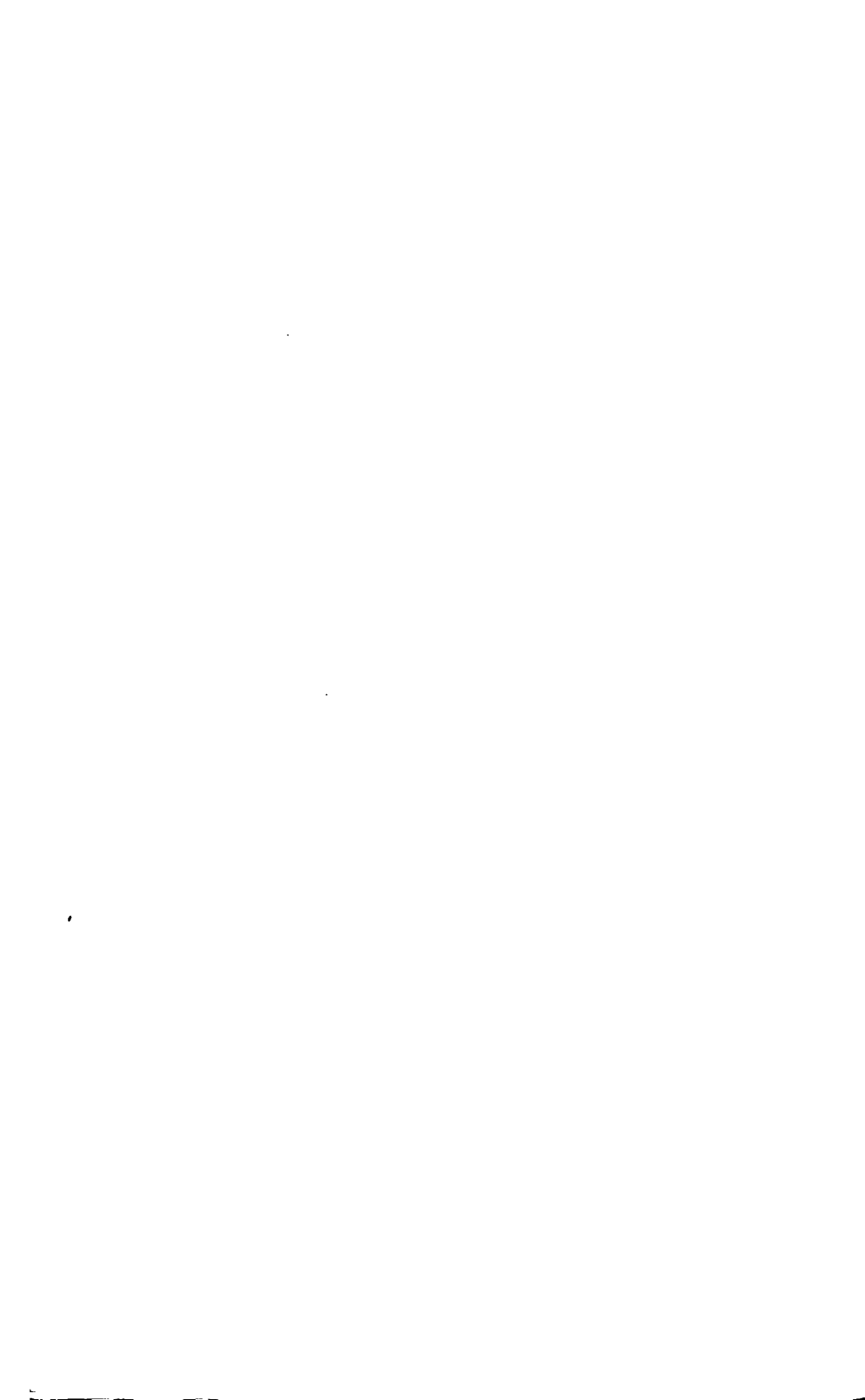




















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SEYMOUR D. THOMPSON EDITOR.

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## PREFACE.

In beginning a new series of *THE SOUTHERN LAW REVIEW*, it is, perhaps, proper to say a few words with reference to the plan on which it will in future be conducted.

Convinced that the eminent success which the *REVIEW* has achieved under the management of its former able editor, FRANK T. REID, ESQ., of Nashville, has been chiefly due to the excellent original articles on legal topics which it afforded, from the pens of approved writers, we shall retain this as its leading feature. The digest of English and American decisions will be discontinued. In doing this we proceed upon the theory that a quarterly magazine is not published often enough to serve as a vehicle of news. This field is left to the weekly law journals, to which it legitimately belongs. But there is a ground not occupied by such journals which a quarterly may conveniently and properly fill. This ground covers the indefinite limits which may be supposed to exist between a legal *newspaper* and a legal *treatise*. It embraces the publication of original essays on legal topics, of careful and judicious selections from the leading law periodicals published in other countries, and of critical book reviews, written by competent persons. The limited amount of space afforded by the columns of a weekly periodical, the necessity of including in that space a great variety of subjects, and the haste which necessarily attends the preparation and printing of the matters therein embraced, preclude it from occupying this field.

It is designed that the REVIEW shall present, as far as its space will permit, the *best legal thought* in America and Europe on all prominent matters of interest to the profession. Contributions from members of the profession, on subjects germane to the purposes of such a publication will be thankfully received and carefully considered. Should the character of such contributions or the limits of our space prevent us from printing them, they will be returned to the writer at our expense. The names of writers will, in all cases, unless objection is made, be printed at the end of their contributions. We believe this course preferable to "impersonal journalism" for three reasons: First, because it has been successfully pursued by the REVIEW in its past conduct by Mr. REID; secondly, because it is right that those who contribute to our columns should have the credit which their contributions merit; and, thirdly, because it is right that our readers should know who the authors of the various articles are, in order that they may be able to judge what credit to attach to them beyond their intrinsic value. Where contributors do not wish their names to appear, their articles will be marked with a star. The work of the Editor will be limited chiefly to selection and supervision, and he, of course, will not be chargeable with responsibility for opinions expressed by contributors.

Law books sent to us for that purpose will be critically reviewed by competent judges and practitioners, the services of a sufficient number of whom have been secured for that purpose.

# THE SOUTHERN LAW REVIEW.

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## Original Articles.

### *I. MODERN THEORIES OF GOVERNMENT.*

#### NUMBER FOUR.

Two or three years after the publication of his original work on Democracy in America, De Tocqueville added two new volumes. In these he treats, first, of the influence of democracy upon the intellectual movement of the United States; secondly, of its influence on the feelings and sentiments of the Americans; thirdly, its influence on the morals properly so called; and, lastly, of the influence which democratic ideas and sentiments exercise upon political society. In these volumes the deductions are less intimately connected with recognized facts, and are more abstract and profound than in the previous volumes. In these, too, the narrowness of his premises detracts largely from the certainty of his conclusions. He does not take sufficiently into his calculations the circumstances of race, climate, locality, and other elements of his problems.

De Toqueville is of opinion that the general tendency of the laws and institutions of the American democracy is beneficial, and favorable to the prosperity and happiness of the majority; that those institutions tend to make the permanent

interests of the public functionaries identical with those of the people; conduce to a judicious and reflective patriotism, cherish a respect for law, and produce incessant political and industrial activity. These advantages in his view, go very far to compensate for any defects. "What do you ask," he says, "of society and its government? Let us understand. Do you wish to give human nature a certain loftiness, a generous fashion of looking at the things of this world? Do you wish to inspire men with a contempt for material wealth? Do you desire to create or cultivate profound convictions, and prepare the way for great sacrifices? Is it intended to polish the manners, to elevate the morals, and to develop the arts? Do you wish for poesy, noise, and glory? Do you intend to organize a people in a manner to act strongly upon all others? Do you design, then, to attempt great enterprises, and, whatever may be the result, to leave a broad trace in history? If such, in your view, are the principal objects men should propose to themselves in society, do not select the government of democracy; it will not conduct you certainly to those ends. But if it seem useful to you to direct the intellectual and moral activity of man to the requirements of material life and the production of material wealth; if reason appears to you more profitable to man than genius; if your object is not to create heroic virtues, but peaceable habitudes; if you would rather see vices than crimes, and prefer to find fewer great actions on condition of meeting with fewer offenses; if, in place of acting in the bosom of a brilliant society it would content you to live in the midst of a prosperous people; if, in fine, the principal object of government, is not, in your opinion, to give to the entire body of the nation the greatest possible force and glory, but to procure for each individual of that nation the greatest amount of well being with the least amount of misery; then, equalize conditions, and establish the government of democracy." "But if," he adds, "there is no longer time to make the choice, and you are constrained by a force superior to that of man, without reference to your volition, towards one form of government, seek at least to derive all the good it can give; and, knowing its good instincts as

well as its evil tendencies, strive to restrain the latter, and to develop the effects of the other."

"Three things," he observes, "seem to concur more than all others, to the maintenance of the democratic republic of the New World. The first is, the federal form which the Americans have adopted, and which permits to the Union the enjoyment of the power of a great nation with the security of a small one. I find the second in the local or communal institutions, which, moderating the despotism of the majority, give to the people, at the same time, a taste for liberty and the art of being free. The third is found in the constitution of the judiciary powers. I have shown how the tribunals serve to correct the errors of the democracy, and how, without ever arresting the movement of the majority, it succeeds in directing and abating those movements."

But, while he admits the advantages, he is clear sighted enough to see the defects of democratic institutions. The principal of these defects, as developed in America, may be brought together, from various parts of his volumes, thus :

1. The complete subjection of the legislative powers to the will of the electors, by the frequency of elections, and the direct action of the electors by designating in advance, through the instrumentality of political platforms, the action of the representative on the most important subjects of legislation.

2. The concentration in the legislature of all the other powers of government, by the curtailment of executive prerogatives, and the subjection of the judiciary by the mode of election, term of office, and fixation of salaries.

3. The omnipotence of the majority degenerating into the tyranny of the minority, leaving to the latter no other resort than an appeal to force. See, in this connection, Madison in the *Federalist*, No. 51, and Jefferson's letter to Madison of the 15th of March, 1789.

4. Instability of legislation, the inevitable result of the first evil above mentioned.

5. Administrative instability, proceeding from the frequent and rapid changes of incumbents.

6. Selection of inferior men to office, partly from want of

the requisite information, notwithstanding good intentions; partly, from want of inclination to elevate superior merit; democratic institutions, alas, developing "in a high degree the feeling of envy in the human heart." And, partly, also, from an unwillingness in those possessing superior qualifications to descend to those arts of flattery and cunning essential to success.

7. Insufficiency of pay to higher officials.

8. Corruption of public functionaries growing out of the smallness of salaries and the uncertainty of the tenure of office.

9. Want of economy. On which important point the summing up of our author is: "I conclude, then, without having recourse to incomplete statistics, and without indulging in conjectural comparisons, that the democratic government of the Americans is not, as is sometimes alleged, a cheap government. I fear not to predict that, if great embarrassments should one day assail the people of the United States, the imposts among them would become as high as in the greater number of aristocracies and monarchies of Europe." A prophesy, how soon realized!

The inherent vice of democratic government is, our author frequently repeats, its tendency to do away with all restraints to direct popular action, and, therefore, to substitute the whim and caprice of the majority, for the deliberate judgment of the intelligence of the people. "Each government," he says, "carries in itself a vice which seems inherent in the very principle of its existence. The genius of the legislator consists in the capacity to discover this vice. A state may triumph over many bad laws, and the evil which such laws produce is often exaggerated. But every law, the effect of which is to develop the germ of death, cannot fail in the end to become fatal, although its evil effects may not be immediately perceived. The principle of ruin in an absolute monarchy is the unlimited and unreasonable extension of the royal power. A measure which should take away any of the counterpoises to this power left by the constitution would be radically bad, even if its effects should be for a long time inappre-

ciable. So, in countries where the democracy governs and where the people draw everything to themselves, those laws which render the action of the people more and more prompt and irresistible, attack in a direct manner the existence of the government. The greatest merit of the founders of the American constitution lies in the fact that they saw clearly this truth, and had the courage to put it in practice. They conceived that there must be, outside of the people, a certain number of powers, which, without being completely independent of them, should, however, enjoy in their sphere a sufficiently large degree of liberty; in such way that, although forced to obey the permanent direction of the majority, they might nevertheless contend against their caprices, and refuse their dangerous exigencies. With this view they concentrated all the executive power of the nation in a single hand; they gave to the president extended prerogatives, and armed him with the veto to resist the encroachments of the legislature." In the same way, he shows elsewhere, the federal constitution, by the longer terms of the senators and their mode of election, sought to provide against the subjection of the legislature to the whim and caprice of the people, leaving them at the same time subject to their mature wishes and intelligent determinations. The principle of presidential re-election he considers, however, as essentially nullifying the object had in view in giving to the executive large independent powers. The effect is to deprive the executive of the will to execute his prerogatives. "Re-eligible, the president becomes a docile instrument in the hands of the majority. He loves what they love, hates what they hate; he hastens to forestall their wishes, acts in advance of their complaints, and bows to their smallest caprices. The constitution intended he should guide the people; instead, he follows them."

While the founders of the constitution labored to provide against so palpable a danger, the state constitutions have, on the contrary, swept away all checks by shortening the terms of official service, by doing away with all substantial difference between the senate and lower house, by abolishing the veto power and otherwise limiting the functions of the executive.

In this way, they have effectually run counter to the wiser teachings of the federal forefathers. The inevitable tendency of democracies, our author shows, is to concentrate all powers into the hands of the legislative body, for this body emanating directly from the people, is most subject to their immediate influence. This concentration, while it singularly prejudices the good conduct of public affairs, strengthens the despotism of the majority.

This despotism of the majority is a fearful peril in the eyes of De Tocqueville, as well as of Sismondi, and other modern publicists. "When," says our author, "I see the right and faculty of doing everything conceded to any power whatever, whether you call it people or sovereign, democracy or aristocracy, whether exercised in a monarchy or a republic, I say there is the germ of tyranny, and I desire to live under other laws. I regard, therefore, as impious and detestable the maxim, that in the matter of government the majority of the people have the right to do everything; and yet I place in the will of the majority the origin of all powers. \* \* What is a majority taken collectively, except an individual who has opinions, and most frequently interests, contrary to another individual named the minority. Now, if you admit that a man clothed with omnipotence may abuse it to the prejudice of his adversary, why do you not admit the same thing in the case of a majority? Men combining together do not change their character. The power of omnipotence which I refuse to a single individual of my species, I will never concede to many." The aim of the legislator should be so to combine the elements of government as to temper the will of the majority with justice to the minority. The machinery should be so arranged that the action of the majority shall be brought to bear upon the minority calmly, slowly, understandingly, impartially. "Suppose," says our author, "a legislative body composed in such a manner that it represents the majority without being necessarily the slave of its passions; an executive power which has a force proper to itself; and a judiciary independent of the other two powers; you will still have a democratic government, but with scarcely any chance for tyranny." Vol.



2, p. 147. Why may we not, in reality, have such a government?

The regulation of the action of the majority upon the minority was the subject of profound thought to the statesmen who urged the formation, and secured the adoption of the union. It has been entirely lost sight of by the statesmen of the day who control the present workings of the general government. The effort, on the contrary, seems to be to see how unbearable legislation can be made for the minority. As early as the 20th of December, 1787, Mr. Jefferson, in a letter to Mr. Madison, suggested one remedy, which would also tend to diminish the evils of the instability of legislation. He suggests that the interval of a year be interposed between the presentation of a measure and its final passage, unless it receive the support of two-thirds of both houses of the legislature; tax laws, which operate equally on the majority and the minority, and measures essential to the progress of government, being, of course, excepted from the rule. Hamilton in the *Federalist*, No. 73, and Madison in the *Federalist*, No. 62, discuss the subject with their usual ability.

Our author is of opinion that there must be "a social power superior to all others placed somewhere," and he concedes, as we have seen, that this must be in the will of the majority as the "origin of all power." The will of the majority is, consequently, in his view, a necessity of the democratic organization. But he insists that it should be tempered and controlled by constitutional obstacles to prevent hasty and tyrannical action. Sismondi, on the contrary, does not admit the right of the majority to govern—the majority of every community being exactly that class which ought least to be entrusted with power, the ignorant and the vicious. Accordingly, while he admits that every class ought to be represented in the government, he insists that the franchise ought to be so distributed as to throw the controlling power into the hands of those who represent the intelligence and property. De Tocqueville concedes the general truth of Sismondi's objection, and admits that the problem for the statesman is to discover some means of inducing the majority to select proper

representatives, and to give the latter freedom of individual action. The remedy he suggests, as I have already stated, is to multiply the degrees of election. "I have no hesitation in averring," he says, "that I see in the double electoral degree the only means of safely entrusting the use of political franchise to all classes of the people." The "double degree" was adopted in the federal constitution in the case of the president and of the senators in Congress, but the benefits have, in a great measure, been lost in the actual practice. The same system was adopted for the selection of members of the legislative body by the French constitutions of the 13th of September, 1791, and the 22d of August, 1795, and was revived after the restoration of the Bourbons. The practical effect, Sismondi says, was to render the people indifferent to the elections. Under Louis Phillipe and the Republic of 1848, the vote of the people was by "*scrutin de liste*," the ballot of a list of names to represent the whole nation, the selections for the list being, of course, made by the government, or a party, not by the voter. Under the second empire the election was of a representative for a definite district and population by universal suffrage.

Among the suggestions which have been made upon the subject of regulating the will of the majority and the workings of universal suffrage, it seems strange to me that so little stress has been laid upon graduation in office, and restriction upon the selection of candidates. The former is a practical suggestion familiar to every person in the ordinary affairs of life, where each young man is expected to perform the duties of a lower place before he undertakes a higher, and which was actually carried out in the Roman republic. And, as to the second, nothing is clearer than that it is easier to narrow the circle from which official selections are made than to limit the right of suffrage.

As a general rule, in the early days of Rome, a citizen could not aspire to a higher office until he had filled a lower. Age and experience were thus secured to all the more important positions. Why may not the same system be adopted in our modern democratic governments? If we can secure as servants of the people men who have become qualified by pre-

vious training, one great evil would be remedied. "Nothing," says our author, "can be more pernicious than the example of sudden and unmerited elevation presented to the regards of a democratic people. It gives the final impulse over the precipice to which everything tends to plunge the human heart. It is, then, in times of skepticism and equality, that care should especially be taken that the mere favor of the people, or of the executive chief, should not take the place of knowledge and services. It is particularly desirable that each step should appear to be the fruit of an effort, so that no elevation shall be too easy, and that ambition shall be constrained to fix its regards on the goal long before it is reached." Too true, and woefully neglected in our best of all possible republics, where sudden success even to the highest offices is the rule, and gradual progress the exception.

It would not be difficult to add other requisites to official candidacy. The qualifications of education, or property, or professional training, in addition to official apprenticeship or graduation, might be added. What a vast advantage would it be if no one could be elected to the house of representatives of our state legislatures, unless he were thirty years of age, settled in life, of good education, and of at least five years' standing in some profession, trade, or honorable occupation; nor to the senate unless he had served one term in the house, or held some other designated office; nor to the office of governor until he had served both in the house and senate, or been a judge of one of the superior courts for a certain number of years, or had served in the Congress of the Union, or attained a certain rank in the army by actual service. If the principle of restriction or graduation were once recognized, it would be easy to adapt the requirements to meet the varying exigencies of the actual. Experience, too, would soon point out the proper mode of making exceptions to the general rule, as, for example, by a two-thirds vote of the legislature, or a plebiscite of the whole people.

As an incentive, too, to devotion to the public service, there should be some honorable and permanent positions, with adequate compensation, for those who have attained the highest

grades. Why should not our ex-governors and ex-presidents become permanent members of the higher branch of the legislature, as senators for the state or Union at large, the ex-governor of the state senate, the ex-president of the United States senate? Or they might become permanent members of an executive council to which some of the duties of the Roman censorship might be attached. In times of intense political excitement, common to all governments, and too frequent in republics, to whom could the people look, with such entire confidence, for advice and guidance as to those who have filled the measure of their own highest ambition, and their country's glory.

Thinkers differ as to De Tocqueville's success in his attempt to ascertain the effect of democratic institutions on human intellect, sentiments, and morals; and, *e converso*, the influence which democratic ideas and convictions exercise upon political society. His reasoning is based almost wholly on the laws of mind, irrespective of locality, nationality, climate, and other extraneous or adventitious circumstances. He distinctly excludes these data from his problem. "I am well aware," he says, "that many of my contemporaries have thought that peoples are never here below masters of themselves, and that they obey necessarily a certain, I know not what, insurmountable and unintelligent force which springs from anterior events, from race, from soil, or climate. These are false and cowardly doctrines, which can only produce feeble men and pusillanimous nations. Providence has not created the human race either entirely independent, or altogether slave. It traces, it is true, around each man a fatal circle from which he cannot escape; but within its vast limits, man is powerful and free; so of nations. The nations of our day cannot prevent equality of conditions, but it depends upon them whether this equality shall carry them to slavery or liberty, to civilization or barbarism, to prosperity or misery." These are noble words worthy of our author and his theme. But it cannot be denied, although the influence of the causes alluded to may have been exaggerated by a class of writers (Montesquieu, our author's eminent French predecessor, and the lamented Buckle, for example),

that these causes are potent factors in the great human problem. Well says another distinguished countryman of our author, the Abbe Laménais, in his *Politique à l'usage du Peuple*: "It will not do to trust too much to the power of man. He can do much, beyond doubt, but he cannot do everything. Humanity, like the physical world, has its general laws against which struggle is useless, and these laws fix the direction, and, so to speak, determine the curve which it must describe in its passage through time. And the action of these sovereign laws is never made more manifest than on those occasions when the people, yielding to an unknown force, are borne forward blindly in appearance in their vast orbits; and the end towards which they are carried is assuredly that assigned by the Supreme Regulator."

The idea thus expressed is nearly identical in effect with the theory of Buckle. Both authors see the Divine hand in the shaping of human events as well as in the regulation of the physical universe. One, however, considers the exercise of such powers as the watchful care of Providence over His creatures having a free will to act within certain limits, shaping their ends, "rough hew them how they will." The other believes the action of the mind to be, like the action of inert matter, the mere result of fixed and immutable laws, over which the individual has no more control than the growing tree or the upheaving mountain. Both recognize a Supreme Cause but differ as to his mode of action. And both agree that this action, whether general or special, fixed from before the creation of the world or variable by intelligence, is, except within definite limits, beyond human control.

De Tocqueville has a higher opinion of human capacity than either the learned Catholic publicist or the free-thinking Englishman, and is inclined to enlarge the circle of its achievements. He had, at the time, the enthusiasm of youth, and his words find a warm response in the hearts of those to whom, as yet, "nature smiles infinite around, and all is joy and the budding of hope." Alas, for our early day-dreams! It was one of our eminent American judges who said, that while it is a bad sign to see a young man without faith in human progress, it

is equally as bad a sign to see an old man who retains that faith in all its pristine vigor. Every man of generous impulses must go through the process from which even Thomas Jefferson and Alexis De Tocqueville, the two great apostles of modern democracy, were not exempt. The former, thoroughly imbued with those principles of universal brotherhood and human perfectibility which characterized the philosophy of the eighteenth century, was aroused from his pleasant dreams by that famous "fire bell in the night," whose tones still ring ominous to the patriotic ear. The latter, who when penning his great work, firmly believed that the world was entering upon what he called the "democratic eras," wherein the voice of the people would have a controlling influence in the spread of liberty and equality, was fain to confess, towards the close of life, that "mankind seemed to him to progress less and less towards that lofty goal which he had imagined in the enthusiasm of youth." And he adds, with a perceptible Parisian shrug: "*Mais nous ne sommes pas responsables de ses fautes et de ses vices; et pour des gens qui ne doivent passer qu'un certain temps au spectacle, la piece est assez curieuse.*" Lettre de 8 Nov., 1855.

It may not be out of place to add that this remarkable man frequently in his later letters refers to his travels in the western wilds of the United States with lingering pleasure. "These grand old trees," he writes to his friend Beaumont, "seen through the snow, recall to me the woods of Tennessee through which we journeyed now well nigh twenty-five years ago, during even a ruder spell of weather. \* \* This little retrospect has put me in a better humor, and, as a climax to my self gratulation, I remember that I have preserved up to the present hour the same friend with whom I then hunted perroquets at Memphis." Happy is he, who, after the illusions of youth, can have the same consciousness as our author of having performed his task while it was yet time to work, and who can attain the like "serenite en vieillissant," to use his own words.

Return we to our theme. While leaning towards our author's encouraging views of human nature, we must not ignore facts. The causes which he declines to consider are undoubtedly, in

the present state of the world's progress, potent for good or evil. Their absence from his analysis narrows its range, renders its outlines vague, and detracts largely from its practical merits. For this reason, and on account of the abstract character of his deductions, the second part of his great work has not been as popular as the first, and has subjected the author to the charge of generalizing too much and on insufficient data. But in no part of his work are his depth of thought and acute discrimination more conspicuous.

His leading idea is that democracy has a tendency to individualize its subjects, that is, to narrow the field of their activity to self, increase the love of each individual for material wealth and personal enjoyment, and weaken the links which bind him to his fellow men; that the effect is to make the citizen weak but society strong; to induce everyone to look upon his neighbor with jealousy, and to side with the government. The tendency of democratic society is, consequently, to the separation of the members (that is to anarchy), and to the absorption of the powers and will of each member into the government (that is despotism). He dreads the latter result more than the former, although the former will itself lead to the latter indirectly. The counterpoises to these tendencies are the love of liberty, the exercise of local independence, and the strengthening of the hands of the individual citizen in his conflicts with the central power, by an independent judiciary. "To fix," he says, "the social powers by broad, but definite and immovable limits; to give to individuals certain rights and to guarantee to them their incontestable enjoyment; to preserve to each individual the little of independence, and force, and originality which remain to him; to lift him to the level of society and to sustain him in the face of it; these seem to me to be the main objects of the legislator in the ages on which we are entering." Vol. 4, page 335. The right of local administration through officials elected directly by the people, freedom of the press, and an independent judiciary, are, in his view, the remedies best adapted to counteract the evils in question.

He refers to a marked distinction between the English and

French intellect, which he attributes to the greater influence of the democratic element in France than in England. But has not this distinction been always characteristic of the two races? "We may say of the English," he remarks, "that the human intellect, tears itself, with regret and grief, from the contemplation of particular facts in order to ascend to their causes, and that it never generalizes except in spite of itself. On the contrary, it seems, that with us the taste for general ideas has become a passion so unbridled that it must be satisfied at all hazards. I learn every morning on awakening that some one has discovered a certain general and eternal law of which I had never before heard."

Our author is himself in his last two volumes subject to this very charge. He generalizes on nearly every page, and sometimes on very insufficient data. Thus, he says, the effect of equality is to produce the conviction in men that everything in this world is explicable, and that nothing is beyond the grasp of human intelligence. Hence, such people deny promptly what they can not understand; have little faith in the extraordinary, and an almost invincible disgust for the supernatural. He adds: "We can foresee that democratic peoples will not readily believe in divine missions, that they will laugh at new prophets, and that they will be anxious to find within the limits of humanity, and not outside of those limits, the principal arbiter of their beliefs." All this may be true, but the success of the Mormon prophet, of Millerism for a time, and of the new faith of spiritualism, go far to render such generalizations questionable. It is true that further on in the volume, he qualifies the general rule by suggesting that the very fact of such a state of mind in the majority may lead to exactly an opposite result in the few. "We find here and there," he says, "in the bosom of American society, some souls filled with an exalted and almost mad spiritualism which is rarely encountered in Europe. There arise from time to time certain strange sects which strive to open extraordinary ways to eternal happiness. Religious follies are very common. We must not, then, be surprised to find, in the bosom of a society which thinks only of the earth, a small number of individuals who wish to look



only to heaven. I would be surprised, if, among a people exclusively pre-occupied with worldly property, mysticism does not very soon make some progress." The exceptions may, indeed, prove the rule, and the two suggestions taken together demonstrate our author's profound sagacity.

Again, he thinks democratic institutions draw a very clear line between temporal and religious affairs, and he comments on the care with which the American clergy avoid meddling with public questions. Here, again, the observation may be true of those questions which divide the individuals of every neighborhood, but it is not true of the far more important sectional controversies. It is notorious that the Protestant clergy have always taken an active part in such cases, and the schisms of the churches, growing out of this departure of the clergy from their proper sphere of duty, were the first alarming indications of the catastrophe which shook the republic to its center. Our author's views of the spread of catholicism, and his reasons to account for it, are also somewhat questionable.

One of his observations is less dubious. "It is not by long and learned demonstration that the world is led. The rapid grasp of a particular fact, the daily study of the changeable passions of the crowd, the hazard of the moment, and the skill to take advantage of the chance, these decide all things." In one of his letters he thus condenses the idea: "This world belongs to energy." Yes, indeed, it is the action, action, action of the great orator, the *veni, vidi, vici* of the great general, which tells in the whirl of human affairs. It is not the greatest but the most active intellect which wins in the struggle of life.

Love of equality and love of liberty are, in our author's opinion, not only distinct but antagonistic, the former being, he insists, by far the stronger passion. The tendency of equality, in his view as we have already seen, is to strengthen the government, and weaken the individual, in other words to centralization and despotism. The best correction of this evil tendency is the love of liberty, which ought, therefore, to be cherished and cultivated.

The tendency of democratic institutions is, he thinks, to fos-

ter the material interests, and to develop the peaceful instincts of a people. The fear is therefore, in his view, groundless which many persons entertain that such institutions bear in them seeds of commotion independent of those common to all forms of government. Equality of condition and love of liberty have not, in themselves, any tendencies which would justify such apprehensions. His sagacity readily discovered, what our own statesmen had not been blind to, that there was a cause pregnant of danger in the difference of social organization in the two great sections of the Union. "If," he says, "America ever experiences great revolutions, they will be brought about by the presence of the blacks upon the soil of the United States; that is to say, it will not be the equality of conditions, but, on the contrary, their inequality that will produce them." V. 4. ch. 21. Unlike other thinkers on this theme, he does not trace the "revolution" which he foresees, to any "irrepressible conflict" between free and slave labor, nor to the mere diversity of interests occasioned by the existence of the institution. He goes deeper, and sees the creation of different nationalities. "Slavery," he says, "has not created at the South interests contrary to those at the North; but it has modified the character of the inhabitants of the South, and has given them different habitudes." After dwelling upon the manner in which the modification is wrought, he sums up the general result apparent even in his day, say 1830: "The American of the South is more natural, more spiritual, more frank, more generous, more intellectual, and more brilliant. The American of the North is more active, more reasonable, more enlightened, and more skillful. The one has the tastes, the prejudices, the weaknesses and the grandeur of all aristocracies. The other has the qualities and the defects which characterise the middle classes. Unite two men in association, give them the same interests, and in part the same opinions; if their character, their lights, and their civilization differ, the chances are many that they will not agree. The same remark is applicable to an association of nations. Slavery, then, does not directly attack the American confederation by its interests, but indirectly by the manners." The idea is that sla-

very, by its indirect action upon the manners of the people, produces a distinct nationality. The people of a slave country, subjected to precisely the same political institutions as the people of an adjoining free territory, acquire certain leading traits of character which will distinguish them from their neighbors. These traits would of themselves, he thinks, tend to the disruption of political ties. Combine them with difference of climate, of soil, of industrial pursuits, and general habits, and you have all the elements for the creation of distinct nationalities. This is, doubtless, the true solution of the American conflict. The event was hastened by the apparent determination of the North, evidenced by the election of a president by an exclusive sectional vote upon a purely sectional platform, to violate the common pact of union, but it would have occurred, sooner or later, under any circumstances, and under any form of government. It is, therefore, not to be attributed to any natural tendency of democratic institutions to internal commotion, or national disruption.

Our author's whole treatment of the subject of slavery is singularly free from prejudice, and marvellously acute and profound. But it is sincerely to be hoped that the conflict of races, which he foresees as the necessary result of the abolition of slavery, may have a more peaceable solution than he fears.

The result of modern thought is favorable to the democratic element of government. All of our authors concede that it will wield a potent influence in the future, and most of them admit that it ought. They concur in thinking that there should be checks upon its sudden impulses, the more numerous in proportion to the strength of the element itself. The problem for the statesman of the future is to regulate this formidable motive power so as to utilize the greatest amount of force without seriously risking the entire machine. The great thinkers, whom we have been following, have blazed the way, and set up signs of guidance and warning. It remains to be seen whether their teachings shall bear fruit, or, become waste paper, thrown out, as Carlyle would say, "to rot — the sport of rainy winds."

W. F. COOPER.

## II. THE LEGAL ASPECTS OF THE LOUISIANA CASE.

With the close of the great rebellion the United States took what, in some respects, was a new departure in free government. Whither does it lead us? Perhaps a consideration of the case of one state, if it shall fail to answer for us this question, will at least furnish us occasion for serious reflection.

The state of Louisiana was admitted to representation in Congress by an act of that body passed June 25, 1868. The sole condition imposed by the act, was that the state should ratify the 14th amendment to the Federal Constitution, and this was complied with July 8, 1868. On the thirteenth day of the same month military rule was withdrawn from the state in full recognition that the state had complied with all the requirements to complete restoration to its rights as a sovereign state in the Union. In November of that year its vote for Horatio Seymour for president was received and counted by vote of the two houses of Congress. Its state officers elected in that year took possession and held their offices for the regular term, and an election for representatives and for one state officer took place in 1870, and the latter was installed in office, and held for the constitutional period. A new election took place in November, 1872, at the same time with the choice of presidential electors.

State elections, which involve a possible change in the whole *personnel* of the executive department, and the whole of one house of the legislature, are likely to bring out a good deal of earnestness of feeling, and if the election promises to be close, are usually attended with more or less excitement, which in some countries might threaten danger. Especially is this the case if a presidential election takes place at the same time, the result of which may possibly be determined by the vote of a single state. But the training of our people in reverence for

law, and their high regard for the sacred right to a free expression of public sentiment at the polls, are usually relied upon with entire confidence to carry us with safety and without serious instances of unfairness through all such periods of earnest interest and excitement. We are not aware that by the public at large anything different was looked for as likely to result from the election in Louisiana in 1872.

That peaceful anticipations were not indulged in all quarters, however, is evidenced by the following order transmitted from Washington by telegraph, and by the events which followed, showing that it had reference to this election :

“DEPARTMENT OF JUSTICE, Dec. 3, 1872.

“S. B. PACKARD, ESQ.,

*“United States Marshal, New Orleans, Louisiana :*

“You are to enforce the decrees and mandates of the United States courts, no matter by whom resisted, and Gen. Emory will furnish you with all necessary troops for that purpose.

GEO. H. WILLIAMS, Attorney-General.”

On the face of this order there is nothing to indicate that it was anything more than an ordinary direction to a ministerial officer to take care that the process lawfully issued to him is lawfully executed and obeyed. To the general public it would have conveyed no intimation that revolutionary proceedings were contemplated or feared, and the only wonder would have been that the attorney-general should deem it necessary to speak of troops in connection with the service of judicial process, when the public could have no reason to suppose or suspect that anything but peaceful obedience would be shown when lawful process was exhibited. As, however, the order was unusual, and it was communicated in a method not well suited to convey official directions, and not usually resorted to except in cases of urgency, it is reasonable to suppose that it must have had reference to process which the attorney-general had cause to believe was to be issued, and which it might be anticipated would be opposed by force too great to be over-

come by the arm of the civil authority. What was this anticipated process?

At the election in the preceding month, John McEnery and W. P. Kellogg headed, respectively, the tickets supported by the opposing parties, as their candidates for governor. The former represented what was called the Conservative, and the latter what claimed to be the Republican party. The former had the support of Gov. Warmoth, the incumbent. In consequence of proceedings, which it is not necessary here to particularize, two sets of persons after the election claimed to be the lawful returning board, empowered to receive the returns from the local election boards, and canvass and declare the result. One of these was called the Warmoth board, and was recognized by the governor; the other was known as the Lynch board. The former obtained the returns and was about to proceed to canvass them, when Kellogg filed a bill against its members and others in the United States Circuit Court for the District of Louisiana, charging Warmoth and his confederates with plans to deprive persons of their right to vote in consequence of their race, color and previous condition of servitude, and with carrying out these plans by refusing registration to a large number. This allegation was introduced in order to give the court a pretence of jurisdiction, but no relief whatever was prayed for which could be referred to it, and it cannot, therefore, be regarded as anything more than a pretence. The relief the bill prayed for was the production of sworn copies of the returns in possession of the Warmoth board, in order that the evidences of the election might not be lost by the fraudulent destruction of the returns. Upon this bill, however, upon an *ex parte* motion, Judge E. H. Durell, the United States District Judge, proceeded to issue an injunction, which assumed to decide the Lynch board to be the lawful returning board; commanded the Warmoth board not to meet and act together as such, and enjoined McEnery from "in any manner acting or pretending to act as governor of the state of Louisiana, and from making any pretensions or asserting any claim to the office of governor of said state by virtue of any certificate, count, canvass, or adjudication now or here-

after made" by the Warmoth board. That a federal judge should have assumed to act at all upon such a bill, would be thought in ordinary times sufficiently alarming, but that he should issue an injunction restraining persons claiming to be state officers, and recognized by the governor of the state, from performing the duties of the office, without even the decent pretext of having in proper form been requested to do so, is simply astounding.

The date of this order was November 16, 1872, and the injunction was served by the United States Marshal on the next day (Sunday). Three days later the legislature of the state took the matter in hand, and passed an act repealing all laws under which the two contesting boards claimed a right to act. Following this immediately one of the state courts, on a bill filed for the purpose, enjoined the Lynch board from acting, and a new board under the governor's lead proceeded to canvass the returns and declare the McEnery ticket elected. None of these facts seem to have operated to the discouragement of the Lynch board, who, on the sixth day of December, proceeded to declare the Kellogg ticket elected. A committee of the United States Senate, which afterwards examined the subject, seems to have thought that the difficulties in the way of a canvass by the Lynch board, were quite too serious for men of reasonable discretion to encounter; for, first, if they had ever held office, they were legislated out; second, if they were in office, they were enjoined from acting; and, third, if they were permitted to act, they had no returns to canvass. These, however, seemed to have proved insignificant obstacles to persons who probably knew that in support of anything they might do "decrees and mandates" were to be had, and the aid of "all necessary troops." Their adjudication embraced the cases of governor, lieutenant-governor, auditor, attorney-general, secretary of state and superintendent of public instruction, together with the members of the legislature; and could have been based upon nothing more authentic than public rumor and the reports in the newspapers. In fact, the members of this "board" can-

vassed only their own preferences, and having no votes to count, simply counted in their friends.

The canvass by the new board and its result were proclaimed by the Governor, December 4, 1872. The next night Judge Durell, as the senate committee say, "out of court, at his house, late at night, without application by any party," made an order "which is without parallel, and it is hoped will remain so in judicial proceedings." This order, which is entitled in Kellogg's case, recites the injunction or restraining order, and the governor's proclamation, and then proceeds: "Now, therefore, in order to prevent the further obstruction of the proceedings in this cause, and further, to prevent a violation of the orders of this court, to the imminent danger of disturbing the public peace, it is hereby ordered that the marshal of the United States for the district of Louisiana *shall forthwith take possession of the building known as the Mechanics Institute, and occupied as the state house for the assembling of the legislature therein, in the city of New Orleans, and hold the same subject to the further order of this court*, and meanwhile to prevent all unlawful assemblage therein under the guise or pretext of authority claimed by virtue of pretended canvass and returns made by said pretended returning officers in contempt and violation of said restraining order; but the marshal is directed to allow the ingress and egress to and from the public offices in said building of persons entitled to the same.

E. H. DURELL."

A state-house to be seized and held subject to the order of an inferior federal judge! If any act could be supposed too monstrous to be attempted, this seizure must certainly be such an act. A judge who thus, without authority, and without observing even the proprieties of form, assumes to direct the invasion of another jurisdiction, and to seize upon the building where the representatives of its sovereignty meet, and having thus installed himself in position of dictator, adjudges without right and without hearing what is and what is not lawful authority under the state election laws, must surely, it would seem, find his pretended authority treated with contempt by all ministerial officers, and himself dealt with severely



and promptly for his great wrong to free government. Not so! The shameful history is too familiar to be reproduced in its details further. A state government was set up under this midnight order by the aid of military force, and in a single day it had no difficulty in impeaching and removing one governor and installing another suited to and ready to co-operate in its purposes. True, the constitution of the state, as well as its statutes, recognized the right of an accused party to be heard in his defence, but of what force could constitution or statutes be in a state-house held "subject to the order" of a judge who did not recognize them, supported by troops instructed to obey his "decrees and mandates?"

McEnery, thus excluded from office by federal power and federal military force, in a manner that superseded all the usual methods of trying civil rights, appealed to the President, and begged him "in the name of all justice to suspend recognition" of either of the contesting claimants to the government until both sides could have an opportunity to be heard, and announced to him "a committee of many of our best citizens on eve of departure for Washington" to lay the facts before him. The answer of the attorney-general to this appeal is here given, and is a model of its kind. The law "hears before it condemns and proceeds upon enquiry," but in the "department of justice," which apparently knows the true prince by instinct, suggestions of such weakness are put aside with calm serenity.

"DEPARTMENT OF JUSTICE, Dec. 13, 1872.

"HON. JOHN MCENERY,

*"New Orleans, Louisiana:—Your visit with a hundred citizens will be unavailing so far as the President is concerned. His decision is made and will not be changed, and the sooner it is acquiesced in, the sooner good order and peace will be restored.*

GEO. H. WILLIAMS, Attorney-General."

On the next day, the officer commanding the military forces at New Orleans was directed by telegraph "to use all necessary force to preserve the peace," in that state. As the pres-

ervation of the peace is peculiarly the province of the state government, this order could only be understood as one to use all necessary force to set up and sustain the state government that had been decided on by Judge Durell and the department of justice. In that sense it has been obeyed and enforced ever since. Only a single break in the monotony of usurped judicial and military rule has since occurred. On the 14th day of September, 1874, the people of Louisiana, by spontaneous movement, expressed their intention no longer to submit to the government thus forced upon them, and it instantly disappeared. With all the machinery of government in his hands, and the police of the great city of New Orleans organized and disciplined at his command, Gov. Kellogg was so utterly powerless that he did not venture to appeal to popular support, but with a keen sense of what it was that constituted his constituency, he called upon the federal authorities to restore him to power. The call was not in vain, and the only government which had sufficient popular sanction in the state to be able to stand alone for a single hour, was dispersed as revolutionary, by federal proclamation, and the government that had been set up by the midnight order of a judge, acting without jurisdiction, out of court, and without parties before him, was restored to power.

Thus far, it will be seen, that the Kellogg government had no better or other justification or excuse for its existence than the pretended judicial order of Judge Durell, for which a parallel will be sought in vain in the history of the Anglo-Saxon race since parliamentary government was established. The Kellogg government never came in on a canvass of votes, but was set up under the judge's order, with military assistance and protection, in a building held under the judge's control until his further order. The President's recognition of that government was based upon this order, and all federal executive and military action expressly ignored any considerations which might lie back of it. The order has never been revoked, and though void in itself and a most daring usurpation of the rights of the state, it has had an active and most powerful force and vitality to this day. The condition of

things can only be properly indicated by saying that from the date when a state government was set up by force, under this order, the affairs of the state have been managed by a semi-judicial receivership, with only this difference from ordinary receiverships, that even the power that set it up can not call the receiver to account for any mismanagement or abuse of trust.

Great and manifold as were these invasions of popular and constitutional rights, they were destined to be followed by others still more serious and alarming. The constitution and laws of the state, though set aside for the time being by the federal judge, were still nominally in force, and Gov. Kellogg and his legislature and subordinates professed to be acting under them. Under the constitution an election would take place in November, 1874, and though a governor was not then to be chosen, a legislature was, and this election would enable the people to take substantial control into their own hands. Such anticipations might well be indulged, even after making large allowances for election trickery and fraud, if the Kellogg government was so entirely lacking in popular support as was generally believed.

But all anticipations proved greatly deficient in their allowances for the resources of judicial-military government. To begin with, that government had what was believed to be an impregnable position in the election laws of the state, which seem ingeniously contrived to enable a corrupt executive to perpetuate his power. The whole machinery of the election laws was in the hands of the governor, who appoints all the officers. It is so unusual in the states that the local election officers shall be appointed by the governor, that this of itself was well calculated to excite suspicion, which, however, might, to some extent, have been allayed by the provision of statute that the members of each election board should be selected from the different political parties. How much regard was paid to this will be apparent when it is seen that the state returning board of five members, to which the local boards were to send their returns for final canvass, and which, by the law, was to represent "all parties," was, in fact, made up of five of the governor's party, and though one conservative was after-

wards placed upon the board by a concession to an almost universal public demand, this one representative of "all parties" but the governor's, soon resigned, when a course of deliberate fraud was entered upon, leaving the whole business of the returning board in the hands of a single party.

So far as this board was to act in canvassing the votes cast in the various precincts for state officers, it answered to the ordinary state canvassing board, and there could be no reasonable objection to its being composed exclusively of members of one party. Its duties would consist in an examination of the local returns as to their genuineness, and a footing up of the totals, with a declaration of the results shown by such totals. These duties would be merely ministerial, and while the declaration would constitute *prima facie* evidence of the result of the election, it would not be a conclusive adjudication.\* But the election law of Louisiana made the state returning board something more than a board of state canvassers. It gave the board authority to go behind the returns whenever they were accompanied by any protest of a supervisor of registration or a commissioner of election, showing, under oath, that violence, intimidation, or corruption at or near the place of registration or election had prevented a fair, free, peaceable and full vote, and to enquire into and pass upon the effect of such unlawful action. This evidently conferred upon the board judicial functions in cases in which protests were sent up, but if they could exercise such functions in other cases, it must be upon grounds not recognized as valid in other states.

Whatever may be thought of other powers conferred upon the returning board, one of the provisions of the election law must certainly be conceded to be very extraordinary. We refer now to the provision which made the board judge

\**People v. Cook*, 8 N. Y. 67; *Brower v. O'Brien*, 2 Ind. 423; *People v. Kilduff*, 15 Ill. 492; *People v. Head*, 25 Ill. 325; *Dishon v. Smith*, 10 Iowa, 212; *People v. Van Cleve*, 1 Mich. 362; *Attorney-General v. Ely*, 4 Wis. 420; *Attorney-General v. Barstow*, 4 Wis. 567; *State v. Governor*, 1 Dutcher, 331; *Mayo v. Freeland*, 10 Mo. 629; *Thompson v. Circuit Judge*, 9 Ala. 338; *State v. Avery*, 14 Wis. 122; *People v. Cicotte*, 16 Mich. 283; *People v. Vail*, 20 Wend. 12.

of the election of members of the legislature, required them to make return of those elected to the secretary of state, who in turn was to transmit a list to the clerk of the last house and secretary of the senate, respectively; and which provided further, that the persons named in the clerk's lists "and none other," should be competent to organize the two houses respectively.

We say this provision is very extraordinary, for several reasons:

1. It is in utter disregard of a fundamental principle of representative government, as old at least as the reign of the first Stuart, that each house of the legislature is to judge of the qualification, election and return of its own members. That narrow and arbitrary monarch undertook by his proclamation for his first parliament to limit the choice of the electors in selecting representatives, and he designated persons "bankrupt and outlawed;" as those who were not to be sent up. The electors of Bucks disregarded the admonition, and selected Sir Francis Goodwin, who had been outlawed in civil proceedings. The sheriff refused to make the usual return, and another election was had, and Sir John Fortescue was returned. The house of commons, then in the infancy of its power, and with but an imperfect understanding of the privileges ever since exercised with general consent and approbation, ignored the restriction in the King's proclamation, and gave Sir Francis Goodwin his seat. The controversy over this action—the anger of the King, and the refusal of the house to listen to the advice or remonstrance of the lords and the judges—are too familiar to historical students to require that the facts should be repeated here. It is true that the house at length, with the consent of Sir Francis Goodwin, and in order to avoid a quarrel with the King at the beginning of his reign, consented to a compromise, under which both Goodwin and Fortescue gave way to a new election, but the right of the house to judge finally on the questions which the case raised has been considered as settled from that period.\* In America this parlia-

\* "No attempt was ever afterwards made to dispute their exclusive

mentary privilege of legislative bodies has always been regarded as one resting upon ancient and undoubted right, as unquestionable as the right to punish contempts of its authority, and as necessary to the proper execution of its powers.\* And though it is customary to declare in our constitutions that each house shall be the final judge in such cases, the declaration is only out of abundant caution, just as, by the declaration that no man shall be deprived of life or liberty without due process of law, we negative the existence of an arbitrary authority which, without any such declaration, is by implication denied in all free governments.† If, therefore, the legislature had the power to make this returning board the judge of the election and return of members of the legislature, its exercise of that power was at war with the principles of republican government, and might justly excite the liveliest apprehensions.

2. By the constitution of the state such a board could not have a power conferred upon them such as was assumed to be exercised. That instrument expressly provides (Tit. 2, art. 34) that each house shall be judge of the qualifications, elections and returns of its own members. It also provides (Tit. 3, art. 46) that "Returns of all elections for members of the general assembly shall be made to the secretary of state." The returns here intended are manifestly those by the local election boards,

jurisdiction." Hallam Const. Hist. ch. vi. The proceedings are given at length in the Parliamentary History of England, vol. v. p. 55 *et seq.* London, Thomas Osborne, 1751. And see Cushing, Legislative Assemblies, § 146 and note.

\* "This power is so essential to the free election and independent existence of a legislative assembly, that it may be regarded as a necessary incident to every body of that description which emanates directly from the people" Cushing Leg. Assemb. § 147.

† Cushing Leg. Assemb. § 147. Where a legislative body seats members in disregard of the law as it has already been laid down by the court of last resort, in a case properly pending before such court, the decision is nevertheless conclusive upon the other departments of the government, and they are precluded from in any manner enquiring into its correctness. *Lamb v. Lynd*, 44 Penn. St. 336; *People v. Mahaney*, 13 Mich. 481; *State v. Jarrett*, 17 Md. 309.

and any attempted diversion of them to the hands of other officials without authority, to sift them out and send up only such as they may see fit, would be in manifest repugnance to this article. We are at a loss to perceive how the apparent conflict of the election law with the power of the legislature to judge of the election of its members, can be reasoned away or excused. Only two methods occur to us. Although the returning board are to judge of the election of members, and return only such as they decide upon, it may be said that this leaves the house at liberty afterwards to review their decisions, and to seat and unseat according to its own judgment. But conceding this right, the house that might do this would be, or might be, not the house chosen by the people, but the house composed of persons certified to by the returning board, who alone under the act would be permitted to participate in the organization, and who, under the present condition of things in Louisiana, might reasonably be relied upon to so "fix things," that the real house would never be permitted to exercise its constitutional right. The 111 members of whom the house is composed might, to any extent, at the option—or, conceding the fairness of the board—according to the judgment of this board, be set aside for others who were not chosen, and not one of them could participate except at the option of these others. It is idle to attempt the defence of an act which places a board with powers so conclusive between the legislature and its constitutional power and privilege.

But it may be said that the right of the house is saved and protected by a clause in the election law, that "nothing in this act shall be construed to conflict with article 34 of the constitution of this state." This is contained in the section which gives to the board its extraordinary powers over the returns of members. If it means that the statute shall be so construed as to preserve the full constitutional privileges of the house, then it means that the statute shall be so construed as to nullify it. For it is obvious that this power of the board to judge of the returns with conclusive effect, so far as the organization of the house is concerned, cannot stand with the constitutional power of the house to pass judg-

ment for itself. As, therefore, the purpose has evidently been that the statute should be enforced, it must be supposed it was not the intent that the constitution should be. The reasonable conclusion must be that when it was declared that nothing in the act should be construed to conflict with the constitution, the intent was, that no one should be at liberty to discover in the constitution anything in conflict with the act, however plain and palpable the conflict might seem to be to a mind at liberty freely to compare them. In this sense the proviso is perfectly in harmony with the manifest general purpose of the election law, and in this sense has effect been given to it by the persons in power.

We are now in the history of those proceedings brought to the election of 1874, and the action of the returning board under it. Only one state officer was to be chosen at this election, but the whole body of representatives, consisting of one hundred and eleven, were to be elected. As has already been said the whole election machinery was in the hands of the governor. Moreover, federal supervisors had been appointed to watch the proceedings, and there was no reason to expect that the sympathies of these officers would be against the governor's party. The first reports of the election would, therefore, naturally favor that party, inasmuch as they would come from or be based upon the action of friendly officials. Those reports gave a clear majority to the conservative or opposition ticket for the state office, and fixed the majority of the conservatives in the house at 29. Of the general accuracy of these reports no doubt was felt in the country. But this was before the returning board had begun its work.

We have not the space at our command to set forth in full the proceedings of this board. Suffice it to say, that it remained in session for several weeks, busily employed in upsetting the election that had taken place. A part of the time it held open session, and admitted parties interested, and their counsel, and a part of the time it held what was called "executive session," by which was meant only that the doors were closed and public observation excluded. Gradually in "executive session" the conservative majority for the state office, as



shown by the returns made by the officials sympathizing with this board, was cut down to nothing, by rejecting whatever was necessary to that end, and a comfortable majority counted up for the opposing candidate. At the same time the conservative majority in the house was intended to be destroyed by a like process; fifty-three republicans being returned as chosen, and fifty-three conservatives, according to the classification of Gov. Kellogg; and five cases were held too doubtful for the board to pass upon, and their cases were referred to the house itself for decision. Perhaps this permission of the board to the house to pass upon five seats out of one hundred and eleven, was considered a method of saving to the house its constitutional privilege!

Nor shall we stop to characterize these proceedings beyond saying, that in most of the cases in which the board assumed to set aside the returns, and give seats to members not shown to be chosen, they acted without a shadow of justification. In most of the cases there was no protest from the local officers, and no pretence of unfairness, except what the board was able to discover in "executive session." The congressional committee, which afterwards investigated, have given specimens, one of which we transcribe: "The parish of Rapides chose three members to the legislature. The returns elected all three conservatives. When the proofs closed, the only paper filed with the board was the affidavit of the United States supervisor that the election was in all respects full, fair and free. It was not known in the parish that any contest existed against those members. They left their homes and proceeded to New Orleans to be present at the opening of the legislature, no intimation of contesting their seats, or objection to their election, having been given by their opponents. At one of their last sessions, the returning board declared all the republican members elected from that parish. When the papers of the returning board were produced before your committee, there was found among them an affidavit by Mr. Wells, the president of the board, declaring that intimidation had existed at certain polls in that parish, and that the returns from that parish should therefore be rejected. The counsel for the [con-

servative] committee testified that they had no opportunity to contradict the statements of this paper; that they had never seen or known of it before; and, that upon an examination of the papers before the board when the proofs closed, it was not among them." The committee further report, that an enquiry into the facts showed that Mr. Wells was not in the parish of Rapides on the day of the election, and had, therefore, deliberately sworn to facts of which he could have had no knowledge. Moreover, they find as a fact that his affidavit was false. They made repeated efforts to obtain some explanation from this official, but without avail. They were "therefore constrained to declare that the action of the returning board, in the rejection of these returns in the parish of Rapides, and giving the seats in that parish to republican candidates, was arbitrary, unfair and without warrant of law." The board, on the false affidavit of its president, regarding a subject of which he had no knowledge, had not only counted out members for "intimidation," but had also counted in members not elected, on a supposition that without intimidation they would have been chosen! What power they possessed to look into the hearts of electors, and ascertain what unexpressed purpose lay hidden there, we know not; but we venture to say there is not another state in the Union in which a general charge that intimidation has existed at a poll would be held to warrant an election board in counting in candidates on no other evidence than that a majority of votes was cast against them.\* But when a board is to act upon the sole evidence of its presiding officer and leading spirit, which he, at least, knows is baseless, it must be exceedingly difficult to set a limit to its discretion.

With a clerk of their own party to call the roll, and half the members of the same affiliations, the board had reasonable ground for believing that the organization of the house was in their own hands, especially as one member returned as a

\* The following cases may usefully be consulted in this connection: *Renner v. Bennett*, 21 Ohio, N. S. 431; *State v. McDaniel*, 22 Ohio, N. S. 354; *Matter of Long Island R. R. Co.*, 19 Wend. 37; *People v. Phillips*, 1 Denio, 389; *Newcum v. Kirtly*, 15 B. Monr. 575.

conservative was counted as unreliable. With the lower house organized in the Kellogg interest, the judicial-military government would be fastened upon the people for another two years. And why not permanently? If two elections may be manipulated in disregard of the constitution and laws, what necessity that the people of the state should ever again be permitted to exercise the rights of free government?

One circumstance overlooked by the returning board would be of the highest importance, if a contest should ever come to a decision by the rules of law. That was that the board had expressly abstained from making any decision in the case of five members who were duly returned by the local boards as chosen. All of these were conservatives, and with the conservatives who received certificates from the board, constituted a clear majority. It was assumed that the failure to certify in their cases would preclude their taking their seats until the house should so decide. But this was a palpable error. They had in the returns of the local boards *prima facie* evidence of their election, which, in any case, would prevail until set aside by competent authority. Assuming the board to be such competent authority, it had not acted, but had referred the cases to the house. Those members would, consequently, go to the house taking the *prima facie* evidences of their right with them, and would be as competent to act in all stages as any other members of that body. The board, itself, must be understood to have recognized their *prima facie* right by declining to decide against it. The idea that a failure to pass upon it could exclude them from the house until that body should decide in their favor, is not to be entertained for a moment. That would be giving to the board's non-action all the effect of an adverse adjudication; which would be preposterous.

When, therefore, the members, declared by the returning board to have been chosen, and these five members who had the proper local evidence of their election, appeared in the hall of representatives on the fourth day of January, 1875, for the organization of the house, the conservatives had a clear majority of members holding the evidences of their right to participate in the legislative proceedings. All of them, together

with contestants of seats, were admitted to the hall through files of soldiers who excluded the general public. What followed is a long story if full particulars are given, but the substance may be stated as follows: The clerk of the last house proceeded to call the roll, which embraced the names of those only who had been declared elected by the returning board. Immediately on his concluding, Mr. Boileau, a member, rose and nominated Mr. Wiltz for temporary chairman. Amid considerable excitement he put the vote, and declared it carried. Mr. Wiltz immediately stepped forward, took from the old clerk the gavel, and called the house to order. The official oath was at once administered to him by a magistrate who was present, and Mr. Wiltz then administered the oath to the other members, who rose for the purpose. A member nominated Mr. Trezevant for clerk; the motion was put and declared carried. Mr. Trezevant came forward and took his seat. In the same manner Mr. Flook was chosen sergeant-at-arms. Assistant sergeants-at-arms were then appointed, and a motion to seat the members whose cases had been referred to the legislature was put and carried. During all these proceedings, republican members were protesting, but the protests were not regarded. The five members were sworn in, and the house then proceeded to the election of a speaker. On that election 58 members voted, of whom 55 voted for Mr. Wiltz. During the roll call when Mr. Hahn's name was called, he desired to make an explanation, and was permitted to do so. He spoke at some length, denying the validity of the proceedings which were being taken. All this time, outside the bar, were a large number of police, supported by federal troops. Mr. Wiltz maintained control for some time after his election as speaker, and when at length the republican members attempted to withdraw from the hall, he instructed the sergeant-at-arms to prevent them. This led to disturbance, and pistols were displayed, when a conservative member moved that Gen. DeTrobriand be requested to preserve order. The general was not in the room, though his soldiers were, but he was sent for, and seems to have quieted the disorder by a word, and then retired. The congressional committee say, "the action of the house pro-

ceeded for an hour or so without interruption, during which time a committee on contested seats was appointed, minor officers elected, and debate had, but no message was sent to the senate or to the governor, notifying them that the house was organized and ready to proceed to business, when at length Col. De Trobriand returned and stated he had orders to remove the five members sworn in who had not been returned by the returning board." The subsequent proceedings are given in the words of Speaker Wiltz embodied in a memorial to Congress:

"While the proceedings of the house were quietly progressing, about the hour of three o'clock P. M., General P. R. De Trobriand, commanding the United States troops in and around the state house, entered the hall in uniform, his sword at his side, accompanied by two of his staff, and Mr. Vigers, the former clerk of the house, and addressed Speaker Wiltz, exhibiting documents, of which the following are copies:

"STATE OF LOUISIANA, EXECUTIVE DEPARTMENT, }  
NEW ORLEANS, January 4, 1875. }

"General De Trobriand, Commanding:

"An illegal assembly of men having taken possession of the hall of the house of representatives, and the police not being able to dislodge them, I respectfully request that you will immediately clear the hall and the state house of all persons not returned as legal members of the house of representatives by the returning board of the state.

(Signed)

WM. P. KELLOGG,  
Governor of the State of Louisiana.

"EXECUTIVE DEPARTMENT, }  
NEW ORLEANS, LOUISIANA, January 4. }

"General De Trobriand:

"The clerk of the house, who has in his possession the roll issued by the secretary of state, of the legal members of the house of representatives, will point out to you those persons now in the hall of the house of representatives returned by the legal returning board of the state.

(Signed)

WM. P. KELLOGG, Governor of State.

"The speaker refused to allow Mr. Vigers to read these documents, he not being clerk of the house, and at the request of General De Trobriand, they were read by his adjutant. Speaker Wiltz then asked General De Trobriand:

"Have you submitted these documents to General Emory?

"General De Trobriand—I have not, but I presume that duplicate copies have been sent to him.

"Speaker Wiltz—I wish to say to you that since our organization we have admitted, sworn in, and seated five members from the referred parishes. Are these members to be ejected?

"General De Trobriand—I am but a soldier. There are my orders. I cannot enter into a consideration of that question. The General further stated that he was under instructions to obey the orders of Governor Kellogg.

"Speaker Wiltz—I respect you, General, as a gentleman and a soldier, and dislike to give you trouble; but I, like you, have a duty to perform, which I owe to my state—to maintain the dignity and authority of my position as speaker of the house of representatives. Force will have to be used before I can permit you to execute your orders.

"Upon the refusal of Speaker Wiltz and Mr. Trezevant, clerk, to point out the persons, and the refusal of Speaker Wiltz to allow Wm. Vigers to call the roll for the purpose of identifying the members, Hugh J. Campbell and T. D. Anderson assisted General De Trobriand in identifying the members to be ejected.

"General De Trobriand then ordered his soldiers, fully armed with fixed bayonets, into the hall from the lobby, and approached the members successively, while in their seats—namely, Oquinn, Vaughan, Stafford, Jeffrys, Luckett, Dunn, Kelly, Horan and Land—and, one by one, he caused them to be taken from the hall by his soldiers, each gentleman first rising in his place and uttering his solemn protest, in the name of his constituents, against the unlawful expulsion. Thus were gentlemen ignominiously arrested, and, despite their public protestations and their appeals to the speaker and the house for protection, which neither could afford, were taken from their seats and forcibly ejected from the hall of the house of representatives of the state of Louisiana, at the point of the bayonet, by officers and soldiers of the United States army.

"General De Trobriand then proceeded to eject the clerk and arrest the proceedings of the assembly, and for that purpose brought a file of soldiers to the speaker's stand, when the speaker arose and addressed the house as follows:

"As the legal speaker of the house of representatives of the state of Louisiana, I protest against this invasion of our hall by the soldiers of the United States, with loaded muskets and fixed bayonets. We have seen our brother members violently seized by force of arms, and torn from us in spite of their solemn protests. We have seen a file of soldiers marched up the aisle of the hall of the house of representatives of Louisiana, and have protested against this in the name of a once free people. In the name of the down-trodden state of Louisiana, I again enter my solemn protest. The chair of the speaker of the house of representatives of the state of Louisiana is surrounded by United States troops. The hall of the house of representatives is in the possession of armed forces, and I call upon the representatives of the state of Louisiana to retire with me from their presence.

"Speaker Wiltz then left the hall, followed by all the conservative members, the hall being left in possession of the military."

These proceedings left the hall in the possession of Gov. Kellogg's friends, and it is needless to say that the judicial-military government was restored to unquestioned power.

What is the justification for these proceedings? We ask the question in the name of republican institutions which we have been taught to revere, and which have been transmitted to us as a precious legacy, acquired by great and almost continuous expenditure of blood and treasure through several centuries. The justification has been attempted on the ground that the Wiltz house was unlawful and disorderly. But this justification wholly fails. The assemblage was entirely lawful, because it was composed of men whose duty it was under the law to appear on that day in that place and proceed to business. Unlawfulness could not, therefore, be predicated of their presence, for even the military guard had admitted the legality of that by allowing their entrance. Once in, the facts clearly show that the house became organized. If there was error or illegality in admitting the five members, it was one which could not be corrected either by executive action or by force of arms. It was an error which the house alone could correct, by virtue of its plenary and exclusive power. But there was no error. The five members were as plainly entitled to their seats as any of the rest, and it would have

been an act of manifest injustice for the house to deny them the privilege of taking such seats. No person or committee that has ever examined the subject has ventured to deny their right. The whole congressional committee sent there to enquire into the facts, has affirmed it in the most emphatic terms, and condemned the returning board as arbitrary, unfair and unjust in raising any question concerning it. When, therefore, Gen. De Trobriand's soldiers, with muskets and bayonets, forced those members from the house, they were guilty of as high-handed an outrage upon free institutions, and as glaring an invasion of representative privileges, as was Charles I., when with like force he attempted the arrest of the five members of Parliament whose course displeased him. Those who commend the one act should be prepared to join in reversing the condemnation which long since the public opinion of Great Britain and America passed upon the other.

If the house was not legally organized, the case is no better. There is no requirement that a legislative body shall organize the first hour, day or week, or without disorder. Some of us have vivid recollections of cases when Congress has failed for a considerable period to perfect an organization, and when the disorder was quite as great as has ever been charged against the body which chose Mr. Wiltz speaker. The case of the Twenty-sixth Congress, when the contested election in New Jersey left the house in a condition corresponding to that in which the action of the returning board left the house in Louisiana, is in several particulars most nearly analogous to this. In that case also, a member of the house assumed to put a motion in disregard of the clerk, and thereby initiated the proceedings which brought order out of chaos. But this was not until four days of disorder. "What a spectacle," he exclaimed, "do we here present! We degrade and disgrace our constituents and the country. We do not and can not organize; and why? Because the clerk of this house—the mere clerk, whom we create, whom we employ, and whose existence depends upon our will—usurps the *throne*, and sets us, the representatives, the vicegerents of the American people, at defiance, and holds us in contempt." And this mem-



ber was *John Quincy Adams*, who may safely be assumed to have understood the principles of representative government quite as thoroughly as any one of the file of soldiers who, at the request of Gov. Kellogg, unseated the five members.

It is clear that disorder among the members could furnish no ground for the interference of the governor, unless he was acting under some other rules than are to be found in the constitution or statutes of Louisiana, or in the common law. The three departments of the government are separate, distinct and independent, and they are purposely made so from a conviction based upon long experience, that this is necessary if we would prevent such a concentration of power as would constitute tyranny. As well might the legislature send a sergeant-at-arms to remove the governor from his room when he is regardless of the proprieties of life, or the judges from the bench when they are guilty of indecorum. The proceedings in the one case or the other would be palpable usurpation which might lawfully be resisted even unto death.

But justifying the governor does not necessarily justify the military force. This is conceded by those who attempt to reason on the subject, and they fall back upon the provision in the constitution of the United States which requires the United States "on application of the legislature, or of the executive when the legislature can not be convened," to protect each state "against domestic violence." \* This provision seems in the opinion of some persons, to constitute the ever ready instrument by means of which the federal government may overturn the administration of a state when it proves out of harmony with the prevailing federal policy. Even while we are writing, an attempt to revolutionize the state of Arkansas under pretence of this authority has barely failed. But the utmost violence to the language can not make it cover this case. In the first place, there was no domestic violence. This term evidently implies a degree of force which can not be suppressed by state power, and the remedy is regarded an ex-

\* Art. 4, § 4. The meaning of this clause is elaborately considered in an article in the *International Review*, for January, 1875, prepared with special reference to the case of Arkansas.

trema one. But the "violence" had not gone beyond a threatening exhibition of pistols by a few persons; and with the building itself in the hands of a friendly military force, Gov. Kellogg's police must have been greatly wanting in courage if they could not have preserved order among the few persons who, by grace of the military, had been admitted to the hall. In the next place, the legislature could be convened, and actually had been. Therefore, there was no authority in the governor to make application for help, and the legislature made none. Indeed the application for force was with a view to employ it against the only authority that, by the constitution, under the circumstances, could lawfully have called for it. The case was consequently the exact opposite of that in which the constitution contemplated federal action. But, in the third place, even the governor did not make application to "the United States." He applied to Gen. De Trobriand. That gentleman may be every way honorable and respectable; he may be thoroughly competent to deal with all those questions of law and constitutional right which sometimes perplex the minds of lawyers and statesmen in contested elections of representatives, but he is not the representative of the sovereignty of the Union, and empowered as such to decide upon applications for aid in suppressing violence. Neither, if he falls back upon the orders of Gen. Emory, his immediate superior, can that officer be regarded as such representative. It is plain, therefore, that the constitution of the United States furnishes no justification whatever to the proceedings of the military force, which broke up a legislature and led five of its members from the hall, as a king of England, two centuries and a half ago, hazarded his head in doing; hazarded and justly lost. And let it not be said any more that these five persons were not members. They were elected by the people; the election was certified by a board composed of their adversaries; the congressional committee of seven members unanimously reported that there was no ground for contesting their right. They thus have both state and federal testimony to their election. But, perhaps, most conclusive testimony of all is the fact that the chairman

of the returning board, who could make oath to facts of which he knew nothing, in order to unseat others, did not venture to decide against them. Surely, the case must have been very plain in their favor when it could thus be passed over by this board without seating others in their place!

We have endeavored to consider this case from a purely legal and constitutional standpoint. It is unfortunate that it has been obscured, somewhat, by its supposed necessary connection with party politics. It has no such connection. It concerns the rights and liberties of all the people and all the states, and one party has the same interest in reproving the outrages as the other. It as far transcends in importance all mere party questions at this time, as the life of a free state transcends in value the salaries of a few offices. The party which nominally gains by these wrongs, may be the one to actually suffer by the next, for which these furnish the precedents. But indeed no party in free government can possibly gain by the destruction of the liberties of any. It is like a great destruction by fire, in which the whole community must necessarily suffer. Indeed, Kellogg and his associates belong to no party but that of themselves. A republican senate has indirectly condemned the Kellogg government by declining to admit to a seat a senator chosen by it. The house has repeated the condemnation, by ejecting the members returned by fraud in 1872. A committee, mainly of republicans, while declining to pass upon Kellogg's election, has unanimously censured the usurpation of 1874. The leading lawyers among the republicans of both houses, have generally united in the opinion that the proceedings of the pretended state government, ever since 1872, find no support in the constitution or laws of the state. The best sentiment of the republican press is to the same effect. Before this general sentiment the usurping judge abandoned his office in dismay, with the alternative presented to him of probable impeachment and removal by a republican Congress, if he should fail to resign. No man, therefore, can be accused of partisanship who unites his voice in the general condemnation, or who, for the sake of the perpetuity of free institutions threatened by such measures, and certain to

be destroyed by their repetition, enters his protest as an American citizen against them.

An act, like that of Gen. De Trobriand, wounds our institutions in their most vital and sensitive parts.

1. It invades the immemorial privileges of the legislative body, being in direct violation of its constitutional right to judge of the election and return of its members. Nothing need be added here to what has already been said on that score.

2. It violates the rights of the state by encroaching upon its authority, and overthrowing that department which most immediately represents the sovereignty of its people. It is of no consequence that the governor invited it. The governor, in acting outside his constitutional power was no more to be regarded than any other individual, and all parties to whom he appealed were bound to know that he was inviting aid in support of usurpation. It is precisely at this point that our institutions are most vulnerable. The proper boundary between national and state powers was agreed upon after long discussion, with much difficulty as the result of a compromise, and it has been found so satisfactory that we have willingly endured a most destructive war in its defence. The cost of that war has been expended in vain if at its conclusion we propose to treat that boundary as a shadowy line which none need regard. The only safety to our institutions consists in standing by their fundamental principles, of which the just division of local and general powers is, by the constitution, made first and most prominent.

3. But nothing can exceed in immediate danger the employment of the military to coerce the civil authority. Upon this subject Anglo-Saxon people have always been justly sensitive. They showed it by the petition of right, in which Charles I. was compelled to assent that soldiers should not be quartered upon the subject, and that commissions for proceeding by martial law should be revoked. They showed it in the declaration against a standing army in the bill of rights, upon the basis of which was settled the revolution of 1688. The people of Boston showed it when, in 1770,

they drove the royal soldiers out of the town. The federal constitution and the constitution of every state in the Union contains provisions referable to the same well-founded jealousy. The Parliament of Great Britain will make provision for the government of the army only from year to year, in order that at all times it may be subject to parliamentary control, and that no ambitious executive may be enabled to employ it against the constitution. British statutes make careful provision against the interference of soldiers in elections, and these have their origin in a belief that military ideas are, to a large extent, antagonistic to those upon which civil government must be administered.\* Is this belief an idle prejudice? Let the case of Louisiana answer. In that state an eminent military commander, upon the heels of the late military settlement of contested seats in the legislature, and while the people were justly excited and indignant, gravely and seriously proposed that by act of Congress, or proclamation of the President, they should be turned over to him for trial as outlaws by military commission! Was this the proposition of one who revered the constitution and proposed to observe it? And what shall we say of the military secretary of war, who could immedi-

\* In 1645 the house of commons passed a resolution "against any interruption to the freedom of election by any commander, government officer or soldier that hath not the right of electing," and in 1741, it resolved "that the presence of a regular body of soldiers at an election of members to serve in Parliament, is a high infringement of the liberties of the subject, a manifest violation of the freedom of elections, and an open defiance of the laws and constitution of this kingdom." And Stat. 8, Geo. II., ch. 30, which by its preamble declares that "by the ancient common law of the land all elections ought to be free," requires that before the day appointed for any election of peers to represent the Scottish peers in Parliament, or of members of the commons, all soldiers billeted or quartered in any place of election, shall be removed a distance of two or more miles, and not return before the expiration of one day from the close of the polls. De Lolme Const. of England, ch. 4. Later acts only confine the soldiers to their barracks instead of requiring their removal, but public sentiment goes farther than the statutes, and Lord Palmerston once met with severe rebuke in the house of commons for permitting a company of volunteers to attend him at the hustings. Fischel on English Constitution, b. 7, ch. 4.

ately telegraph his *thorough approval* of this officer's course? Such a policy would be *thorough*, indeed, beginning with the thorough destruction of the constitution, and ending, we know not in what sea of bloodshed, or after what reign of anarchy. Lord Stafford once advocated a like policy of *thorough*, and a long and bloody civil war, eventuating in revolution, was the result.

On a review of the whole proceedings we are at a loss to discover more than one ground on which they can be defended. That is, that the state, having been conquered in the field, its government has fallen to the camp followers as the booty of war. On this ground, and this alone, Durell and De Trobriand may both be justified!

T. M. COOLEY.

### III. CHIEF JUSTICE WAITE—LAW AND EQUITY.

The opinion of Chief Justice Waite, in the case of Pollard v. Bailey, reported at length in a late number of The Central Law Journal,\* is an admirable specimen of judicial clearness, brevity and condensation, and fully worthy of the high tribunal over which he presides. It would be difficult to find in it a superfluous word, or a paragraph which requires a second reading in order to be perfectly understood. And, as both the premises and the conclusion carry with them their own authority, the entire omission of decided cases to sustain them is worthy, under similar circumstances, of general imitation; for no one feature of the current American judicial opinions is more striking or more objectionable, than the multiplication of citations in support of positions which a few logical sentences would demonstrate to every legal mind. The case, it may be remembered, is an action at law, brought against one stockholder of an insolvent bank by a creditor of the bank; and the decision is, that no such action could be maintained, the charter not expressly authorizing it, but simply providing in one section that the stockholders should be "bound respectively for all the debts of the bank in proportion to their stock holden therein," and in subsequent sections for a bill in equity by any stockholder for the settlement of all the debts and an injunction upon the bank.

This excellent judgment, rendered by the highest court in the country, and wholly predicated upon a fundamental distinction between the respective jurisdictions of *law and equity*, is suggestive of some thoughts upon the much agitated question, whether in the nature of things there exists any such distinction; whether it is not purely artificial and conventional, and ought not to be promptly abrogated in an enlightened age, and in a country of which progress and reform are the cardinal maxims and watchwords. It will be remarked,

\* 2 Cent. L. J. 3.

that the distinction in question, whether just or unjust, wise or foolish, could not well be more emphatically enforced than in the case above referred to. A party plaintiff, showing a perfectly equitable claim against the party defendant, was nevertheless summarily *turned out of court*, merely because he failed to *come in at the proper door*. A few natural, if not very original, remarks may, perhaps, be not out of place upon the general subject hereby suggested.

In the first place it is not unworthy of notice that, with reference to the mutual bearing of law and equity, eminent jurists have been by no means agreed in opinion, but rather "yes and no, with a medium between them." Their differences involve the several points, whether law should be made more elastic and flexible by equity, or equity more exact and unbending by law; whether the two should be blended in one system, or each remain distinct, though, as occasion may require, with mutual action and re-action; and whether the same court should exercise law and equity powers, or the respective jurisdictions be confided to distinct tribunals.

Upon the first of these points Sir Matthew Hale is reported to have said, "by the growth of equity the heart of the common law is eaten out." Upon the last, Lord Bacon expressed himself with epigrammatic and untranslatable point and vigor; thereby not wholly exemplifying the maxim "*boni iudicis est ampliare jurisdictionem*" (the last word of which, however, Lord Mansfield suggested should be "*justitiam*"). Lord Bacon's words are: "*Apud nonnullos receptum est, ut jurisdictio, quæ discernit secundum æquum et bonum, atque illa altera, quæ procedit secundum jus strictum, iisdem curiis deputentur: apud alios autem, ut diversis; omnino placet curiarum separatio. Neque enim servabitur distinctio casuum, si fiat commixtio jurisdictionum, sed arbitrium legem tandem trahet.*" *Bac. de Aug. Scient. lib. 8, ch. 3, aph. 45.*

Passing over the innumerable aphorisms upon the subject which might doubtless be found in the intermediate centuries, the man of our own age—Judge Story—who might almost be called an *idolater* of equity jurisprudence, and did as much, perhaps, to illustrate and expound it as any individual of any age,



had still the candor to admit that there were opinions equally entitled to respect on both sides of the question as to the necessity and utility of *equity* in the shape which it has now assumed. Judge Story says: "Whether it would, or would not, be best to administer the whole of remedial justice in one court, or in one class of courts, without any separation or distinction of suits, or of the form or modes of proceeding and granting relief, is a matter upon which different minds in the same country, and certainly in different countries, would probably arrive at opposite conclusions. And, whether, if distinctions in rights and remedies, and forms of proceeding are admitted in the municipal jurisprudence, it would be best to confide the whole jurisdiction to the same court or courts, is also a matter upon which an equal diversity of judgment might be found to exist." Story's Equ. Jurispr. § 35. It should be added, however, that Judge Story's individual opinion upon the subject is doubtless expressed in the animated and rhetorical peroration of his great work, wherein, Aladdin-like, he calls up "the magnificent temple, reared by the genius and labors of many successive ages, to equity jurisprudence." *Ib.* § 1532. *Per contra*, over this dazzling structure, another American jurist, himself a distinguished commentator, and the successor of Judge Story in the Dane professorship of law at Cambridge, waves a wand, which might well scatter it like a pavilion of gilded cloud. Mr. Parsons says: "It is very difficult for a lawyer trained by the study of the books, and accustomed to the process and practice now in use, to avoid the conclusion, or at least the habitual opinion, that equity jurisprudence and law jurisprudence are divided by an actual difference, and by an hiatus which can not be filled. But an examination of the history of this difference on the one hand, and of its actual condition on the other, will show us that it is wholly artificial, and, if we may ever use the word, accidental. \* \* \* If justice can be done in any case according to law, law should do it. If it can not be done without violation of law, it should not be done. It is quite unreasonable to maintain in this country, and in this age, a system which had no other origin than the necessity that arose from the

jealousies of independent courts centuries ago, in another land and under a different policy." 2 Parsons on Contracts, Preface, pp. 4, 7.

The distinction between law and equity immediately suggested by the judgment of Chief Justice Waite, relates to the matter of *parties* in those respective courts. First, the parties in a court of law. Is it right that there should be strict rules, demanding that every case be litigated between parties to the claim, and declining to recognize a standing in court until an action is so simplified as to meet this requisition. It hardly needs an argument to show, that the abrogation of this principle might lead to endless confusion. Says Baron Bramwell, "if the best known man in England were letting to the next best known man the best known property, it would still be necessary to prove who the parties were, and what they were dealing with." *Wood v. Priestner*, Law Rep. 2 Exch. 261. The very first step to justice between man and man, is to know precisely who makes the demand, and upon whom it is made. *Leaving to men*, a vote in town-meeting, even *tossing up*, would be a far feebler parody upon the administration of *law*, than to allow the intermingling in one suit, of parties having, perhaps, some connection with the subject-matter, but no substantially joint or identical interest. Suppose a man holding distinct promissory notes against ten different individuals, and desiring to settle up his affairs, and to save trouble and expense, should join them in one suit. Confusion enough results even from uniting in one action several claims of like nature against the same person, which the law allows to be done. But, in the case suggested, this confusion might be immeasurably and intolerably increased. One defendant might deny his signature, another plead payment, a third the statute of limitations, a fourth an off-set, and so on to the end of the decade; and the ensuing scene might fully warrant the remark of a facetious judge, that it was very extravagant to buy a ticket for the theatre, when one might attend the Court of Common Pleas for nothing. And it is needless to add, that the same wise restriction as to parties is applied alike to all causes and forms of action at law, even those in which

the greatest latitude is allowed. Thus, although it is a salutary rule, that all parties, directly or indirectly concerned in the commission of a wrong, may be joined as defendants in one suit; it is an equally salutary limitation of the rule, that such joinder is not permitted when different parties act, each for himself, in producing the same injury. A notable case of this kind, never reported, but distinctly remembered, occurred some years ago in Massachusetts, where a joint action was held not maintainable against a physician who prescribed, and an apothecary who put up, a noxious medicine.

And now comes in a court of *equity*, so called, and, as if to emphasize the charge of absurd inconsistency between the two cognate departments of jurisprudence, not merely *allows* parties having no identity of interest to take part in the same suit; but goes a step further, and *forbids a suit upon any other condition*. Such is the judgment in the case of *Pollard v. Bailey*, which dismissed the action for the very reason that it was an attempt to enforce a claim by one single party against another single party—the normal requisition in a court of law—and absolutely demanded that the litigation should assume the complicated shape which we have described as in ordinary cases so inconvenient and impracticable. Why is this? Let the chief justice of the supreme court inform us; “No stockholder is liable for more than his *proportion* of the debts. This proportion can only be ascertained upon an account of the debts and and stock and a pro rata distribution of the indebtedness among the several stockholders. The proper action, therefore, to enforce the liability is one in which such an account can be stated and distribution made. Such an action calls specially for the exercise of the powers of a court of equity, which can bring before it all the necessary parties and adjust all their rights. Every stockholder, when called upon to perform his obligation, has the right to require that the extent thereof shall then be determined once for all, as well that which he is under to his associate stockholders, as that to the creditors. \* \* \* The provision, therefore, for a proportionate liability is equivalent to a provision for an appropriate form of equitable action to enforce it.” Cent. L. J., vol. 2, p. 3.

This quotation, though directly applicable only to the particular circumstances of the case under consideration, very clearly explains the exceptional interference of equity with reference to *parties*. "Ex uno disce omnes." Whenever the course of a trial at law, which from its nature is speedy and summary, would be clogged and impeded by a multiplicity of parties, so that a presiding judge, and more especially a jury, would be hopelessly embarrassed and bewildered by a tangled web of side issues; then the tribunal ceases to accomplish its purpose of substantial justice, and another is to take its place, whose course of proceeding, by the examination of parties, the deliberate inspection of papers, and the aid of subordinate officers, will, though comparatively dilatory, in the end draw order out of chaos, and it may be, prevent an interminable litigation.

It would be inconsistent with the plan of this article, to consider at much length any other ground of equity jurisdiction than that immediately involved in the case referred to. The point of *parties*, however, is closely connected with, if it does not rather make a part of, another department of jurisprudence, which is constantly brought into action, alike in law and equity—namely, *pleading*. *Special pleading* is perhaps more than anything else the scape-goat of all the maledictions which aggrieved *ley gents* shower upon the law. If men have claims, it is said, let them be permitted to state such claims in their own way, without the risk of forfeiting them by failure to cross a *t* or dot an *i*. We weary of these "apices litigandi." Let us have *equity*, not *law*. Now it may be remarked, in passing, and it is a somewhat curious fact, that the almost universal attempts of modern legislation to gratify this querulous demand, have touched pleadings at law far more than those in equity. And it is equally noticeable, that in England special pleading was never more rigidly exacted than it is at the present moment, except so far as it may be embraced in the late sweeping juridical reform. Pleading, when rightly understood, is grossly wronged by the popular notions relating to it. It is well defined as "the statement in a logical and legal form, of the facts which constitute the plaintiff's cause

of action, or the defendant's ground of defence." 1 Chit. Pl., 217. And Chancellor Kent never said anything more truly, than that "the established principles of pleading, which compose what is called its science, are rational, concise, harmonious, and admirably adapted to the investigation of truth." *Bayard v. Malcolm*, 1 John. 471. With regard to that particular work—the Reports of Saunders—which exhibits special pleading with its finest edge and sharpest point; we are informed by very direct and authentic testimony, that Mr. Webster once remarked of the book: "I sat down and made a translation of them into English, and I have it yet, and it was in that way that I made myself familiarly and accurately acquainted with the language of pleading." The Reporters, 214 n.

The mere statement, what the cardinal rules of pleading are, will show that while it may be and often has been perverted to mischievous purposes, its foundation is "*dolus versatur in generalibus*," and its design and tendency are to vindicate truth and right, and to expose and check error, falsehood and wrong. These ends pleading accomplishes by the very logical, almost mathematical exactness and precision from which its bad name is chiefly derived. Such is the rule, that *facts* must be stated, not mere *inferences* or *conclusions*. Such is the rule, forbidding *departure*. That is, the pleader, having assumed his position, cannot, without leave and for special cause, in a subsequent reply to his opponent *depart* from that position by assuming a new and inconsistent one. He may start off with the several allegations: 1, never borrowed the pitcher; 2, broken when I borrowed it; 3, whole when I returned it; but, having elected either one of these alternatives and the adverse party having met him on that ground, and the entertainment having fairly begun; whole or broken the pitcher must be, not both. Such is the rule, that a party must, in his pleading, state just what he will be able to prove, enforced by the correlative course of evidence, which allows him to prove only just that which he has stated, and making *variance* a fatal flaw alike in pleading and in evidence. It is a significant fact, that the legislation in this country, which has

so generally modified the *forms* of pleading, has not changed its *principles*. And it may be added, that, like most other similar attempts, such legislation has accomplished very little towards settling the law, the title of pleading being now, as ever, among the most copious in the reports and digests.

There is one movement in the progress of a cause, not so much a *part* as an *incident* or *accompaniment* of the pleadings, which is deserving of a moment's special consideration, because it is at once so simple and so effective. I refer to what the law terms *demurrer*. By derivation the word means *stop*, and has been well translated, *What of it?* The pleader in any stage of the mutual altercation, is brought to a sudden stand by his antagonist's recorded admission, for the purposes of the trial, that all he alleges is true, but with the accompanying denial, that all he alleges, though true, constitutes, as the case may be, any cause of action or any defense. We call this *simple*, because it is the transfer to a court of justice of what is constantly occurring in daily life. Many a farmer over his winter evening's fire, many a loitering customer at the corner grocery, many a guest at the hotel table, led into a political, social or theological dispute, suddenly *demurs*, without knowing it, to the argument of his opponent, by admitting what he has said—but *what of it?* And, like most other great inventions, the demurrer is as effective as it is simple, for it presents at once, in a few lines, for judicial decision, that which it might have required twelve jurors and perhaps scores of witnesses to bring into an intelligible and tangible shape. Thus free from all that is technical or artificial, and thus securing prompt and final decision; it is not strange that modern legislation, which so extensively changes pleading in other respects, has, with the exception of mere formal defects, left the demurrer intact.

Did space permit, we might proceed to vindicate the law of *evidence*, like that of pleading, from the popular charge of being technical and arbitrary, and of shutting out proofs upon which the issue of a cause often ought to depend. The rules of evidence may sometimes operate harshly, but in themselves they are admirably logical and philosophical, and their general tendency is eminently conservative and salutary. Such is the

rule which forbids oral testimony to control written instruments; that which requires the *best evidence*, that under all the circumstances is attainable; that which excludes *hearsay* evidence, for the reason that it lacks the tests of an oath and of cross-examination, while at the same time admitting it in explanation of accompanying facts; and that which restricts the testimony to the case on trial, as set forth in the preliminary pleadings. These and many other rules which might be mentioned are subject to numerous limitations and exceptions, and some of them have been changed by the statute law. That, for example, which forbids a party to testify in his own case, has been pretty generally abrogated. Very wise men wrote of old: "Nullus idoneus testis in re sua intelligitur," but the maxim has been set at nought by modern legislation, and, perhaps, for sufficient reasons. There are some things, however, which legislation can never accomplish, and one is, preventing the inference, unfavorable to a party, more especially in criminal cases, whom the law allows to testify in his own favor, but who declines the privilege. As the millions of newspaper readers, interested in an exciting trial, will, first of all, enquire, "Did he deny it on oath?" and if not, find the strongest confidence in the party's innocence fearfully shaken; so can no human enactment restrain the twelve men—for men they are—who pass upon his fate, from instinctively receiving the same impression. An eminent judge once remarked, "the next step will be to move for a new trial on account of the expression of countenance of the judge." Whether a new trial will ever be granted, because a juror, or an entire panel, in direct defiance of law, regarded the silence of a prisoner as evidence of guilt, remains to be seen.

A view of the comparative merits and demerits of law and equity would of course be incomplete if it went no farther than to show that many legal rules and processes, often complained of as harsh and inequitable, are so only upon superficial inspection; without at the same time summarily analyzing the system of equity, and ascertaining whether it likewise is obnoxious to charges as grave, though perhaps of a different or even opposite character, as those urged against law.

The scriptural dilemma, "we have piped unto you, and ye have not danced; we have mourned, and ye have not lamented," would seem not inapplicable to the strictures made respectively upon law and equity.

Chief Justice Gibson, of Pennsylvania, long ago remarked, "it has been the policy of the legislature, from the foundation of the province, to dole out equitable power to the courts with a parsimonious hand." *Hays v. The Pennsylvania, etc.*, 17 Penn. 12. And the legislatures of other states, which may fairly be supposed to represent public opinion, have in many cases steadily resisted all attempts to confer full equity jurisdiction upon a court of law, for the very reason already quoted from Lord Bacon, "*arbitrium legem tandem trahet*"—discretion, the *equity* of each case as it arises, will at length supersede law, that unbending code, which, true it is, as we ourselves have complained, so often sacrifices individual justice to technical form and precedent. Now the *people*, who are ultimately responsible for these twofold and not very consistent criticisms, may be not a little surprised to find, that in some instances, equity deals with its offenders with much more apparent harshness than is permitted to law. Take, for example, the process of *injunction*, every day becoming of more and more frequent use in the United States. "Strike, but hear," is the time-honored appeal of the prisoner to his tyrant, which would have better expressed his idea with the slight inversion, "hear, but strike (if I deserve it)". But, in case of injunction, the blow precedes the hearing, the flash comes after the clap. It is foreign from my purpose to state the reasons, which make this summary remedy so eminently useful and necessary. I advert to it only as illustrative of the fact, that *equity* sometimes partakes much more of *martial law* than of the universal toleration which it is often supposed to involve. There are some rather exceptional proceedings at law—*replevin*, *attachment* and *arrest*—which bear a slight resemblance to injunction, but, with their many limitations, neither of them can be regarded as equally stringent and peremptory. It is, moreover, very noticeable, that while, in later years, the severity of the common law has been everywhere



mitigated with reference to *imprisonment for debt*, in a court of equity, imprisonment is still, as heretofore, the penalty for disobedience. Literal *contempt of court* is a mental operation, not easily prevented or punished; but that contempt which consists in disregard of judicial orders is very summarily dealt with, and not condoned by the *poor debtor's oath*. True, the difference, in this respect, between law and equity, arises in part from the consideration that orders in equity are in general not *pecuniary*, but *specific*, and predicated upon the unquestioned ability of the party to obey them, either by act or omission. Still the *fact* remains, that *equity* yet wields a formidable weapon of authority, which the humanity of our age, whether to its full extent wise or unwise, has partially stricken from the hand of *law*. And a further analysis of equity, as contrasted with law, abundantly shows, that the distinction between them by no means consists, as is often imagined, in the disappearance from equity proceedings of strict forms and rules. A bill in equity, indeed, is at times more diffuse and colloquial than the declaration in an action at law. It occasionally indulges in an amount of rhetoric, which might lead some to suppose, that the words "your orator" really forebode what their popular meaning would indicate. But, while law forbids *duplicity*, equity does not tolerate *multifariousness*, and, within its somewhat wider, but equally well-defined limits, refuses to try more than one party or subject, or one set of parties and subjects, at a time. And, with regard to the subsequent pleadings, as we have remarked in another connection, inasmuch as recent legislation has for the most part confined itself to actions at law, the rules may safely be said to be now even more strict in equity than at law. Demurrer, more especially, having the peculiar ground to rest upon, in addition to those at law, of want of jurisdiction, because a court of law furnishes an adequate remedy, is an equitable movement of the most constant occurrence.

With regard to *evidence*, that is, the principles, not the mere mode of communication of evidence—there is some difficulty in pointing out the distinctions between law and equity. The principal, if not the only difference, seems to be the admission

by the latter, in certain cases, of parol testimony to control written instruments, where the former would exclude it. With sufficient precision, these may be stated as cases of *fraud*, *mistake* and *trust*. There are, however, few instances at law, where fraud may *not* be shown, and, on the other hand, comparatively few in equity, in which mere mistake, unaccompanied by other circumstances, is available as a ground of relief. Express trusts, are, for the most part, exclusively the subject of equity jurisdiction; but, so far as recognized at law, are governed by the same rules of evidence as in equity. But with regard to implied trusts, which are usually created by parol evidence, the two tribunals are widely apart as to the admission of such evidence, and the consequent establishment of those trusts, and an implied trust may therefore, as a general proposition, be said to *exist* only in equity. The case of *mortgages*, in this particular point of view, is a very peculiar one. Few questions have given rise to more discussion than that, whether an absolute deed may be turned into a mortgage by parol evidence. No court has more strenuously maintained the negative of this question than that of Massachusetts, in one unbroken series of decisions, until the very recent case of *Campbell v. Dearborn*, 109 Mass. 130, which may well be dwelt upon for a moment, as illustrative of the abrogation of a great rule of evidence by the simple statutory enlargement of the court's equity jurisdiction. The plaintiff conveyed land to the defendant by an absolute deed, but it appeared by parol proof, that the plaintiff purchased the land with money borrowed from the defendant, and, though the plaintiff understood the nature of the conveyance, yet both parties considered it as a security for a loan. The transaction was held to constitute a mortgage. The opinion of the court, reversing so many of its own judgments, is, as it should be, very elaborate, but perhaps a trifle less perspicuous than we are apt to expect from that distinguished tribunal. The grounds of resulting trust and of fraud are expressly repudiated (*Ib.*, pp. 136, 140), although a hard bargain and a small price are afterwards mentioned (*Ib.* pp. 142 144), and the decision seems substantially to rest upon the single fact, that by statute of 1855, ch. 194, § 1

(Gen. Statutes, ch. 113. § 2), jurisdiction is conferred upon the court "in all cases of fraud, and of conveyances or transfers of real estate in the nature of mortgages." Ib. p. 142. Judge Wells says: "The doctrine may be adopted without violation of the statute of frauds, or of any principle of law or evidence; and if properly guarded in administration, may prove a sound and salutary principle of equity jurisprudence. It is a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt." Ib. 143. This very marked change of front will, no doubt, be acquiesced in, and the reasons assigned for it deemed sufficient, unless some *hypercritic* should suggest that to open so wide a door, so long shut and locked, upon the strength of the words, "in the nature of *mortgages*," involves the fatal logical flaw of *begging the question*; since an absolute deed, subject to a mere verbal condition, by the settled law of Massachusetts, *is not a mortgage*, nor "in the nature" of one. The decision, however, brings the law of this state into harmony with that of most of the other states, and of the United States, the latter of which considerations is, indeed, specially mentioned as an incidental justification of it. Ib. p. 140.

In connection with this important case, two points of considerable interest suggest themselves. One is, whether, in an action at law relating to a mortgage, the same new rule of evidence would be adopted; and the other, whether a vendor's lien for the price of the land sold, a claim very widely sanctioned, would now, for the first time, be recognized in Massachusetts.

So far as the mutual relation of the state and United States courts is concerned, it is quite likely that this enlargement of equity jurisdiction may supersede the necessity of fictitious movements for the purpose of suing in a court with full chancery powers. The writer recalls two notable cases of this nature. In one—a case of great magnitude—a party had by repeated applications drained dry the powers of the state court with reference to the extension of time for redemption, and, as most people would have said, becoming discouraged,

*ran off*, but, in truth, *pro hac vice*, became for a *little while* a citizen of another state; brought his suit in the United States court, and obtained a triumphant victory. In the other case, for the purpose of defeating a grossly fraudulent attachment and execution, a conveyance to some one out of the state became necessary. A similar victory ensued, although the nominal plaintiff might fail to remember, from lapse of time *or for other reasons*, the complicated facts, embodied in the reports, which formed the foundation of the suit.

Reverting, for a moment, to our point of departure, the connection or supposed *antagonism* between law and equity; it may perhaps be safe to say, that the two may be regarded as emblematic of that *duality* which is so generally impressed upon nature and life, and may usefully co-exist, as branches of a common jurisprudence; the former, save in exceptional cases, not requiring the mitigating influence of the latter, the latter safely regulated and balanced by its own established rules, without any steadying help from the former, and the two together, with such cautious changes as the exigencies of society may require, constituting as complete a tribunal for the adjustment of controversies between man and man, as human imperfection will admit.

FRANCIS HILLIARD.

#### IV. OBSTRUCTING AND DIVERTING SURFACE AND SUB-SURFACE WATER.\*

In this article we propose to consider the question of a man's right to withdraw surface and sub-surface water from the reach of his neighbor, or otherwise to prevent its passage to him, in whole or in part.†

The Roman law, from which our own has drawn largely concerning rights and duties of this character, contained a provision that it was not actionable for a man, by digging in his own land, to cut off a spring of water from his neighbor, provided it was done in the course of improving his land, and not with intent to commit injury. An owner of lower land could maintain an action against the owner of the upper tenement, if the defendant should send down water otherwise than it was wont to flow by nature. In fine, it was said, one could have the action *aquæ pluvie arcendæ* if the injury from the (surface) water was caused by work done, unless the work was done in the course of the cultivation of the land. There appears, also, to have been a distinction between injuries to land by surface-water and injuries to buildings or walls by water dripping from roofs (*stillicidium*), and by water running in gutters and drains (*flumen*); the action being general in the latter case, and special in the former.‡

The English law contains similar provisions, with, however, some modifications as it descends into the details.

The rule as to surface-water running in no defined channel is, that the owner of the soil may collect and use it, wholly

\* The following article will appear in substance as a note in Mr. Bigelow's forthcoming *Leading Cases on Torts*.—ED.

† The converse subject of sending water back or down upon a neighbor's land is considered in another note.

‡ Digest, Lib. 39, tit. 3, secs. 12-17.

preventing its passage to his neighbor.\* And this was the Roman law also.†

As to surface-streams running in defined channels, the case of *Elliot v. Fitchburg R. R. Co.*,‡ enunciates a doctrine which has become well settled in the law. The principle is, that riparian proprietors have no absolute right to the water of the streams flowing by them, but merely the usufruct. They are entitled to make a proper use of the water; and in no case is a party liable to a lower landowner for abstracting water if actual damage has not been done him.§

There have been expressions by the courts, and one or two decisions, to the effect that the right to the use of the water of a running stream is something more than a usufruct, and is, in fact, absolute and exact, like that to the enjoyment of land; so that any diminution of the water by an upper proprietor is actionable. In *Crook v. Bragg*,|| it was decided that the diversion of a stream was actionable though the plaintiff, a mill-owner upon the opposite bank, did not need the whole or any part of the stream for the use of his mill. But the situation was such that the plaintiff, in order to obtain a supply of water after the diversion, would be compelled to construct a dam or raceway; so that in fact there was a prejudice to him by the act of the defendant, and so the court held. The language of the case must, therefore, be taken with reference to this fact. However, in saying that the right to the water of a stream running through a man's land was as perfect and inde-feasible as the right to the soil, the court were clearly wrong.

But a case in Pennsylvania seems to have gone to the full

\* *Rawston v. Taylor*, 11 Ex. 6c2.

† Digest, Lib. 39, tit. 3, sec. 11. This point has been more fully presented in a previous note.

‡ 10 Cush. 191, given as a leading case in the writer's work on Torts.

§ *Wadsworth v. Tillotson*, 15 Conn. 366; *Gillett v. Johnson*, 30 Conn. 180; *Seeley v. Brush*, 35 Conn. 419; *Chatfield v. Wilson*, 31 Vt. 358; *Gerrish v. New Market Man. Co.*, 30 N. H. 478, 483; *Pollitt v. Long*, 58 Barb. 20; *Dilling v. Murray*, 6 Ind. 324; *Williams v. Morland*, 2 Barn. & C. 910; *Mason v. Hill*, 3 Barn. & Ad. 304; S. C., 5 Barn. & Ad. 1; *Wood v. Wand*, 3 Ex. 748-781.

|| 10 Wend. 260.

extent of this doctrine.\* In this case it appeared that a small stream ran through the lands of both parties, and that the plaintiff, the lower proprietor, had enjoyed the use of the water for upwards of twenty years. The defendant requested the judge at *nisi prius* to charge the jury that he was entitled to a reasonable use of the water for the purpose of his business, and that if they believed that no more than a reasonable quantity for such purpose had been used, as for the creation of steam to drive his engine, the plaintiff had no ground for complaint. The court declined the request, and charged that the defendant had the right to use the stream for any legal purpose, provided he returned it to its channel uncorrupted, and without any essential diminution; and this instruction was upheld by the supreme court. "The wrong," said the court, "must cease, no matter how trifling it may seem. The right of the plaintiff is absolute to be restored to the full enjoyment of his own property, and is not dependent in any manner upon its value to himself or his adversary."

The true principle, however, is that the lower riparian proprietor has, as against the upper proprietor, merely a usufruct, and not an absolute right to the water, however long he may have been in the enjoyment, as the cases above cited show; and this being so, there can be no infraction of the right by any abstraction of water which does not sensibly and injuriously diminish its volume. Without such an act the usufruct is not interfered with and the plaintiff's right, therefore, has not been encroached upon.

In some particulars, indeed, the right of action of a lower proprietor does not depend upon the question of damage. Thus, in *Sampson v. Hoddinott*,† the plaintiff had been accustomed immemorially to receive the water of a stream from the defendant, an upper mill proprietor, at certain times of the day, and he now complained that the defendant let it down at other times; and the court held that he was entitled to recover without proof of actual damage. It follows, *a fortiori*, that an action can be maintained for a permanent diversion,

\* *Wheatley v. Chrisman*, 24 Penn. St. 298.

† 1 Com. B., N. S., 509.

regardless of the effect.\* And in general it is probably true that where a right is exactly defined, any infraction will be ground for an action, entitling the plaintiff to nominal damages at least. Thus, in the case of a right to the possession of land, no one can lawfully put foot upon the soil of another without permission, express or implied; and for every infraction of this right an action may be maintained, though the owner of the land suffered no harm whatever.† But the right of usufruct in running streams is incapable of any such exact definition, and the courts can, therefore, only say that where the plaintiff has sustained actual injury from an undue use of the water, he has a ground of action; short of this he has not.

Whether the test of liability in cases not arising under the statutes concerning mill privileges be the reasonable use of the water, or that of damage to the lower proprietor, is not clear. Both tests are mentioned in *Elliot v. Fitchburg R. R. Co.*, as though they were equivalent; but it was not necessary to consider the point, nor was it considered, since no damage was proved. And it is clear, as we have said, that there must be damage in order to the maintenance of the action. Suppose, however, there is damage to the plaintiff, and yet the use of the water by the defendant has been no more than was usual and reasonably necessary in carrying on his business; is there then a right of action?

In *Gillett v. Johnson*,‡ the test of the reasonable use was applied, but applied as equivalent to that of damage or no damage. The question raised was of the extent of the right of the defendant to the use of a small stream for purposes of irrigation. It was held that the defendant could use the stream for that purpose; but the right, it was said, could only be exercised upon a reasonable regard to the plaintiff's right to the

\* *Tillotson v. Smith*, 32 N. H. 90; *Chatfield v. Wilson*, 27 Vt. 670; *S. C.*, 31 Vt. 358; *Corning v. Troy Iron and Nail Factory*, 40 N. Y. 191, 204; *Van Hoesen v. Coventry*, 10 Barb. 518; *Parker v. Griswold*, 17 Conn. 288.

† *Williams v. Esling*, 4 Barr, 486.

‡ 30 Conn. 180.



use of the water. It was not enough that the water had been applied to a useful and proper purpose, and in a prudent and husband-like manner, as was alleged; the defendant was bound to use it "in such a reasonable manner and quantity as not to deprive plaintiff of a sufficient supply for his cattle."

In an earlier case, cited as authority for this decision, the same court went much farther, and applied the test of reasonable use where it was conceded that the plaintiff had suffered damage.\* In this case the defendant had brought water by an aqueduct, from the common stream to her house for domestic and culinary purposes, and instead of returning the surplus, above what was necessary for such use, to the stream, she allowed it to escape by flowing through small apertures in pen-stalks, in order to keep the water from freezing in winter, and becoming impure in summer. Part of this water irrigated the land, and part went to waste. It was held that these facts gave the plaintiff no right of action.†

It was for some time a doubtful question in England whether water could be diverted from streams for purposes of irrigation;‡ but it is now settled that it may be so used in proper cases.§ And in *Miner v. Gilmour*, just cited, Lord Kingsdown, in delivering the judgment of the court, rejected the test of damage or not, saying that by the general law applicable to running streams, every riparian proprietor has a right to the ordinary use of the water flowing past his land; "for instance," said he, "to the reasonable use of the water for his domestic purposes, and for his cattle, and this without regard to the effect which such use may have in case of a deficiency upon the proprietors lower down the stream."

In cases involving the privileges of mill owners, the rule seems to be well settled that the true test of liability is whether under all the circumstances, considering the size of the water-course, and that of the mill-works, there has been a greater use of the stream, in abstracting or detaining the water, than is

\* *Wadsworth v. Tillotson*, 15 Conn. 366.

† See also *Chatfield v. Wilson*, 31 Vt. 358.

‡ *Wood v. Waud*, 3 Ex. 748, 781.

§ *Embrey v. Owen*, 6 Ex. 353; *Miner v. Gilmour*, 12 Moore, P. C. 131.

reasonably necessary and usual in similar establishments for carrying on the mill, and not whether a lower land-owner has been injured.\*

There is no suggestion that these cases stand upon peculiar grounds, and it is difficult to see any distinction between mill privileges and other privileges of using the water, except in so far as a difference has been made by statute.† It must frequently be impossible to know that a particular use of the water may not injure the lower proprietors. Suppose, for instance, in the case of a brook, that at a time when the lower proprietor is in great need of the water, the necessities of the upper land-owner are also greater than usual, and without surpassing the bounds of what is reasonably necessary for a proper purpose, he exhausts the supply of the brook, and a drought follows; shall the upper proprietor be held liable in view of what he may not have known (the needs of his neighbor), and what he could not foresee (the drought), the act which he did being one which was usual among the riparian owners?

In the Pacific states the rights of prior occupants are much greater. Thus, it is held in California that the person who first appropriates, for mining or other purposes, the waters of a stream running in the public lands, is entitled to the same, to the exclusion of all subsequent appropriations, by other persons for the same or for other purposes.‡ But if the first occupant appropriate only part of the water, another may appropriate the rest; or if he take all upon certain days of the week, another may take all upon other days.§ The appropriation, however, must be for some "useful purpose," present or in

\* *Springfield v. Harris*, 4 Allen, 594; *Davis v. Getchell*, 50 Maine, 602; *Gould v. Boston Duck Co.*, 13 Gray, 442; *Pitts v. Lancaster Mills*, 13, Metc. 156; *Merrifield v. Worcester*, 110 Mass. 216; *Hayes v. Waldron*, 44 N. H. 580; *Snow v. Parsons*, 28 Vt. 459; *Pool v. Lewis*, 41 Ga. 162; *Timm v. Bear*, 29 Wis. 254; *Clinton v. Myers*, 46 N. Y. 511.

† See *Gould v. Boston Duck Co.*, *supra*.

‡ *Smith v. O'Hara*, 43 Cal. 371.

§ *Ibid*.

contemplation, and is not permitted for speculation,\* or for drainage simply.†

As to the right to cut off *underground* water, there was formerly some conflict among the authorities. In *Balston v. Bensted*‡ an action was brought against the defendant for cutting a drain in his close, whereby the supply of water in a certain spring upon the close of the plaintiff, was injuriously diminished. It appeared that the plaintiff had had uninterrupted enjoyment of the spring for upwards of twenty years; and Lord Ellenborough held that an exclusive enjoyment of water for a period of twenty years afforded a conclusive presumption of right in the party so enjoying it.

The leading case of *Acton v. Blundell*§ was of similar character, except that the plaintiff had not been in possession for twenty years. The plaintiff was possessed of a well, which the defendants in carrying on mining operations in their land had drained. It was held in the Exchequer Chamber that the defendants were not liable. This case underwent great consideration; the English authorities, ancient and modern, and the doctrines of the Roman law, being exhaustively reviewed. But the court expressed no opinion as to what would have been the decision had the plaintiff shown an uninterrupted user for twenty years.

In *Dickinson v. Grand Junction Canal Co.*|| the defendants had sunk a well (after there had been disputes and compromises between the parties concerning the abstraction of water from the plaintiffs' ancient mills) on their own land, and erected over it a pump and steam engine, by which they pumped up a quantity of underground water which would otherwise have flowed through the ground into certain streams and supplied the mills of the plaintiffs with water. It was held that the defendants were liable for the damage. But though the mills

\* *Weaver v. Eureka Lake Co.*, 15 Cal. 271.

† *McKinney v. Smith*, 21 Cal. 374. See also *McDonald v. Bear River Co.*, 13 Cal. 220; *Wixon v. Water and Mining Co.*, 24 Cal. 367; *Hill v. Smith*, 29 Cal. 476.

‡ 1 Campb. 463.

§ 12 Mees. & W. 324.

|| 7 Ex. 282.

of the plaintiffs were ancient, the court thought that that fact was not important. "We consider it as settled law," it was said, "that the right to have a stream running in its natural course is not by a presumed grant from long acquiescence on the part of the riparian proprietors above and below, but is *ex jure nature* \* \* \* and an incident of property, as much as the right to have the soil in its natural state, unaltered by the acts of a neighboring proprietor, who can not dig so as to deprive it of the support of his land."

This was said apparently with reference to underground water as well as to surface streams; for the court proceed to to say: "But in the much considered case of *Acton v. Blundell*, in the Court of Exchequer Chamber, a distinction is made for the first time between underground waters and those which flow on the surface; and it was held that the owner of a piece of land who has made a well in it, and thereby enjoyed the benefit of underground water, but for less than twenty years, has no right of action against a neighboring proprietor, who, in sinking for and getting coals from his soil, in the usual and proper manner, causes the well to become dry. The decision goes no further." And the case was thus explained: "In such a case the existence and state of underground water is generally unknown before the well is made; and after it is made there is a difficulty in knowing certainly how much, if indeed any, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to that of his neighbor, who, in digging a mine, or another well, may possibly be only taking back his own. \* \* \* If the course of a subterranean stream were well known, as is the case with many which sink under ground, pursue, for a short space, a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground."

These last and other remarks as to abstracting the water of surface streams appear to have been applied, by way

of illustration, to certain water which the defendants had taken after it had formed part of the river which supplied the mills. The digging of the well was considered as a diversion of the stream, and not as a reasonable use of it. But the same ruling was made as to underground water which had not reached the river, but had been prevented from doing so by the excavation of the well; and this, too, "whether the water was part of an underground watercourse or percolated through the strata." No reasons at all are given for this position, and in view of what was said concerning the doctrine of *Acton v. Blundell*, it seems quite unintelligible.

The question went to the House of Lords in *Chasemore v. Richards*.\* In this case a mill-owner who had for upwards of sixty years enjoyed the use of a stream which was chiefly supplied by percolating underground water, produced by rain-falls, lost the use of the stream after an adjoining owner had dug, on his own ground, an extensive well for the purpose of supplying water to the inhabitants of the district, many of whom had no right themselves to use the underground water. It was held that the mill-owner had no remedy; the judgment of the Exchequer Chamber† being affirmed.

The opinion expressed by Lord Ellenborough in *Balston v. Bensted*, *supra*, as to the prescriptive right to the use of such water, was now overruled, and its inconsistency with *Dickinson v. Grand Junction Canal Co.*, *supra*, pointed out. But this latter case was itself criticised in that the judges had failed to follow the distinction between underground percolating water and visible watercourses, as laid down in *Acton v. Blundell* and commended by themselves.

Upon the question of prescription the court in *Chasemore v. Richards*‡ say: "In such a case as the present is any right derived from the use of the water of the river Wandle for upwards of twenty years for working the plaintiffs' mill? Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the

\* 7 H. L. Cas. 349; S. C. 5 Hurl. & N. 982, Am. ed.

† 2 Hurl. & N. 168.

‡ 7 H. L. Cas. 349, 370.

servient tenement. But what grant can be presumed in the case of percolating waters, depending upon the quantity of rain falling or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiffs' mill would be affected by any water percolating in and out of the defendants' or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of water?"

There is, then, according to the highest authority in England, no such thing as a prescriptive right to an underground percolating water; and the same case (*Chasemore v. Richards*) further decides that a party has no valid claim to such water (*i. e.*, so as to be able to maintain an action for cutting it off; not to prevent him from appropriating it) *jure naturæ*.

Lord Wensleydale (better known as Mr. Baron Parke) hesitated as to applying the rule in full to the particular case of the defendant, though he assented to the correctness of the general principle. He doubted if the defendant had any right to pump out water from the whole neighborhood, including those who would have had no right to take it.\*

Our courts have generally reached the same conclusions with those arrived at in *Chasemore v. Richards*.† The rule (except in New Hampshire) seems therefore to be, that landowners have an unqualified right to underground percolating water, just as they have to the very soil itself (and so the doc-

\* Compare *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569, also *Livingston v. McDonald*, 21 Iowa, 160 as to the extraordinary use of one's premises—a valuable case.

† *Greenleaf v. Francis*, 18 Pick. 117; *Wilson v. New Bedford*, 108 Mass. 261; *Roath v. Driscoll*, 20 Conn. 533; *Chatfield v. Wilson*, 28 Vt. 49; *Ellis v. Duncan*, 21 Barb. 230; *Wheatley v. Baugh*, 25 Penn. St. 528; *Frazier v. Brown*, 12 Ohio St. 294; *Delhi v. Youmans*, 50 Barb. 316; *Bliss v. Gruly*, 45 N. Y. 671; *Mosier v. Caldwell*, 7 Nev. 363; *Hanson v. McCue*, 42 Cal. 303. But see *Bassett v. Salisbury Manuf. Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439, where the unqualified right of the landowner to cut off percolating water was rejected, and the doctrine of a right to do so, in the reasonable use of the soil, adopted.

trine is expressly stated in many of the cases), and not the mere right to a reasonable use of it. The right is like that to the appropriation of surface-water not running in defined channels, and not like that to the water of regular streams. But a landowner would probably have no right to corrupt underground water to the injury of another.

The distinction suggested in *Dickinson v. Grand Junction Canal Co.*, *supra*, between underground water which percolates through the soil, and that which runs below the surface in a defined channel, is recognized by other courts;\* whether it be the case of watercourses proper or ditches made for drainage.†

MELVILLE M. BIGELOW.

\* *New River Co. v. Johnson*, 2 El. & E. 435, 445; *Chasemore v. Richards*, 7 H. L. Cas. 349, 374; *Smith v. Adams*, 6 Paige, 435; *Wheatley v. Baugh*, 25 Penn. St. 528; *Cole Silver M. Co. v. Virginia Water Co.*, 1 Sawyer, 470.

† See *Livingston v. McDonald*, 21 Iowa, 160, 165, showing the difference between ditches for drainage and streams having banks. *Luther v. Winnisimmet Co.*, 9 Cush. 171, 174; *Ashley v. Wolcott*, 11 Cush. 192; *Gillett v. Johnson*, 30 Conn. 180; *Hoyt v. Hudson*, 27 Wis. 656; *Broadbent v. Ramsbotham*, 11 Ex. 602. See further as to drainage, *Waffle v. New York, etc., R. R. Co.*, 58 Barb. 413.

## *V. THE EFFECT OF THE LAW OF ADOPTION UPON RIGHTS OF INHERITANCE.*

Not many years since there died in Missouri, John Richard Dalrymple, leaving a large amount of real and personal property, situated in that state, which was to be distributed in accordance with the provisions of the last will of the deceased.

The testator had been married, and his wife, Martha, survived him, together with two nephews, sons of the testator's brother. Mr. Dalrymple had had no issue. Prior, however, to his death he had adopted a young girl, Julia La Place, whose parents, Charles and Rosetta La Place, are still living, having, besides Julia, several sons and daughters. Shortly after the death of Mr. Dalrymple, Julia, his adopted daughter, also departed this life. About one year subsequent to Julia's death, Mrs. Martha Dalrymple entered into a second marriage.

The adoption of Julia had been effected by deed under the adoption act of Missouri.\* Mrs. Martha Dalrymple had not

\* Wagner's Rev. Stat of Mo. 1870, p. 256. The following are the first three sections of the act in question:

SECTION 1. If any person in this state shall desire to adopt any child or children, as his or her heir or devisee, it shall be lawful for such person to do the same by deed, which deed shall be executed, acknowledged and recorded in the county of the residence of the person executing the same, as in the case of conveyance of real estate.

SEC. 2. A married woman, by joining in the deed of adoption with her husband, shall, with her husband, be capable of adopting any child or children.

SEC. 3. From the time of filing the deed with the recorder, the child or children adopted shall have the same right against the person or persons executing the same, for support and maintenance, and for proper and humane treatment, as a child has, by law, against lawful parents; and such adopted child shall have, in all respects, and enjoy all such rights and privileges as against the persons executing the deed of adoption. This provision shall not extend to other parties, but is confined to parties executing the deed of adoption.



joined with her husband in the execution of the deed of adoption.

The several clauses of Mr. Dalrymple's will run in this way :

First. I will that all my just debts and funeral expenses be fully paid by my executrix, hereinafter mentioned, as soon as convenient after my decease.

Second. I hereby give and bequeath to my beloved wife, Martha Dalrymple, all my estate, real, personal and mixed, for and during her lifetime.

Third. The foregoing bequest is made under the express proviso, that my said wife will be a mother indeed for our adopted daughter, Julia, six years old; that she will bring her up and educate her according to her best means; also that my said wife will carry on and continue my business in company with my copartners; but I will that no part of my real estate, still less the whole of it, be sold or otherwise disposed of, before the lapse of twenty-five years, and should it appear hereafter that the business cannot be carried on with the present capital, then said business shall be reduced to such an extent as to bring it in conformity with said capital.

Fourth. After the decease of my said wife, Martha Dalrymple, the property then left shall be divided as follows: One half of it shall be given to our said adopted daughter, Julia, provided she will be a good girl and demean herself as such towards her parents; and the other half shall go to the nearest and lawful heirs of mine and that of my wife, share and share alike.

Fifth. I hereby nominate and appoint my said wife, Martha Dalrymple, to be the executrix of this my last will and testament.

The adopted daughter, Julia, having died, it became necessary to determine who was to take her interest in the property devised by the testator, whether the same was to go to her heirs, members of her natural family, or to the heirs of the testator. In order to arrive at a proper solution of this question, all of the provisions of the will are to be construed. For the sake of convenience, the writer will first state his conclusions regarding the several clauses of the will, and then assign his reasons for having arrived at the same.\*

\* It is needless to consider the legal effect of the third clause of the will, for by the marriage of Mrs. Dalrymple, subsequent to the testator's death, the copartnership therein mentioned was dissolved, as a matter of law, and the death of Julia does away with the other provisions of the same clause.

While under our statute of wills, Wagn. 1371. § 49, and the decisions thereunder, "all courts and other persons concerned in the execution of last wills, shall have due regard to the directions of the will and the true intent and meaning of the testator, in all matters brought before them," yet, when from the language used by the testator, it is uncertain and doubtful what his intent and meaning was, the construction of a will is bound by precedent, and when the language is identical with that used in reported cases, the intention of the testator is to be settled by judicial authority rather than by conjecture. *Myers v. Eddy*, 47 Barb. 263; *Gillis v. Harris*, 6 Jones (N. C.), 267.

The widow of the testator takes only a life estate in the real and personal property of the testator, after payment of the debts and funeral expenses, under the first and second clauses of the will. The bequest of personalty is given generally and not specifically, and hence the widow is to enjoy a life estate only, with remainders to the persons pointed out in the fourth clause. Personal property may be subjected to the same modifications of ownership as real estate, by way of executory devise. 2 Redfield on Wills, 654, 655, *et seq.*; and see the numerous cases there cited. As to such personal property, the remainder-men may call upon the widow or life tenant to give an inventory and to invest the same for their use, after the death of the life tenant, leaving to the latter the interest during her life-time. *Scott v. Scott*, 2 Bush. (Ky.) 147; *Akerman v. Vreeland*, 1 McCarter (N. J.), 23; *Calkins v. Calkins*, 1 Redf. (N. Y. Surr.) 37; *Dole v. Harrison*, 3 Allen, 364; *Andrew v. Bank of St. Ann*, Ib. 313. As to the realty, the widow is also only a life tenant, under the express terms of the will, with remainder to the persons pointed out in the fourth clause. When the devise is a mixed one, consisting of personalty and realty, the rules of construction and distribution which govern the latter are applied also to the former. *De Beauvoir v. De Beauvoir*, 15 Sim. 163; *S. C. on Appeal*, 3 Ho. of Lds. Cas. 524, 557; *Gwynne v. Muddock*, 14 Ves. 488; *Teltow v. Ashton*, 15 Jur. 213. This is especially true in our American states, where the statutes of descents and distributions apply equally and in the same manner to both personalty and realty.

Rogers v. Brickhouse, 5 Jones, (N. C.) Eq. 301; Grandy v. Sawyer, Phill. (N. C.) Eq. 83; Waller v. Forsythe, Ib. 353; Howard v. Howard, 1 Green (N. J.), 486; Kearney v. Kearney, 2 Ib. 59; Curtis v. Longstreth, 44 Penn. St. 297; Walker v. Milligan, 45 Ib. 178; Andrews v. Bank of Cape Ann, 3 Allen, 313; Paine v. Barnes, 100 Mass. 470. All of these were cases of life estates in both personalty and realty in the first takers with remainders over. In Baxter v. Bowyer, 19 Ohio St. 490, and in Jones v. Stites, 4 Green (N. J.), 59, by one clause of the will, an absolute estate was limited to the first taker; by a subsequent clause, however, a remainder was given to other persons; in both cases it was determined that only a life estate went to the first taker. See also, Swearingen v. Taylor, 14 Mo. 391; Jones v. Waters, Ib. 587; Rose v. McHose, 26 Mo. 590; Collier's Will, 40 Ib. 287; Hook v. Dyer, 47 Ib. 214; Richardson v. Richardson, 49 Ib. 29.

Under the fourth clause of the will, the interest of Julia, the adopted daughter of the testator, was a vested remainder, taking effect at the death of the testator. 2 Wash. on Real Prop. 504-5-6-7, *et seq.*; Alexander v. Walch, 3 Head (Tenn.), 493; Meyer v. Eisler, 29 Md. 8; Taylor v. Mosher, Ib. 443; Womrath v. McCormick, 51 Penn. St. 504; Bugby's Appeal, 61 Penn. St. 111; Pike v. Stevenson, 99 Mass. 188; Jones v. Waters, 17 Mo. 587; Collier's Will, 40 Mo. 287. Case in point: Life estate limited to testator's wife, remainder of one-half of the estate to A., the adopted daughter of testator; held, that A. took a vested and assignable interest. Fay v. Sylvester, 2 Gray, 171.

The proviso or condition in the fourth clause "provided she will be a good girl," etc., is at most only a condition subsequent, and could not have affected the vesting of the estate limited to Julia. Besides, the condition is too uncertain to have enabled a court to determine whether there had been a breach. Butler & Goodale's Case, 6 Co. R. 216; Jones v. Suffolk, 1 Bro. C. C. 528; Fillingham v. Bromley, Turn. & Russ. 530; Clavering v. Ellison, 7 Ho. of Lds. Cas. 707. See the argument of Mr. Roundell Palmer, in the latter case.

Julia, the adopted daughter, became a stirps or stock of

descent as to the interest that had become vested in her. *Ross v. Drake*, 37 Penn. St. 573; *Collier's Will*, 40 Mo. 287.

And now comes the determination of the main question in the case. Who is to take the interest that was vested in Julia at the time of her death? As the writer views the question, the brothers and sisters of Julia, children of her natural father and mother, Charles and Rosetta La Place, inherit Julia's interest in the real and personal estate of the testator. They take equally as parceners under the statute of descents and distributions. *Wagner's Rev. Stat. Mo.* 529.

By the deed of adoption executed by the testator, Julia became his adopted daughter under the adoption act cited above. The construction to be placed upon the act in question, and the change it effects in relations of the adopted child with its natural family and its adoptive parent, must be *stricti juris*, and there can not be a greater change in the legal duties and rights of the adopted child than are sanctioned by the terms of the act. The rules of distribution enacted by the various statutes of descents and distributions, obviously have their origin in the idea or principle of blood-relationship. *Jones v. Barrett*, 30 Texas, 637. The Adoption Act is not founded upon the principle of consanguinity, but sanctions a legal contrivance in direct conflict with that principle, and it must be construed accordingly.

If the effect of the act of adoption is such as to place the child adopted in the family of the adoptive parent, and if the legal duties and rights of the adoptive child are then the same as though it had been born in the adoptive family, and as though its natural parents had never existed, in that case, the interest of the deceased child would pass to the heirs in the adoptive family, and the natural heirs of the deceased would be disinherited. But if the act of adoption has no such effect, if the only result is the giving of an additional property right to the adopted child, without changing the legal duties and rights of any other persons whatsoever, then the interest that had become vested in Julia under the will, passes to her natural heirs, to her brothers and sisters, children of Charles and Rosetta La Place. The latter, we take it, is the correct

legal view on this point. The act of adoption is only an exception to the act of descents and distributions, and the former can bring about no greater change in the rules of descent under the latter than its language plainly indicates.

The first section of the Adoption Act (Wagn. 256,) contemplates, and from the express words used, can only intend a creation of the relation of ancestor and heir, or devisor and devisee between the adopting parent and the adopted child. The only right of inheritance granted by the act is the right of the adopted child to inherit from the adopting parent. There can be no legal inference, whether from the terms or the spirit of the act, that it was intended to give the adopted child a right to inherit from the collateral kindred of the adoptive parent by right of representation. *Moore v. Moore*, 35 Vt. 98. Nor is there anything in the act to warrant the inference that the adopted child is to have the right to take property expressly limited to the body of the parent by adoption, or that the adoptive parent may inherit from the adopted child. There is no indication that the right of inheritance was to be reciprocal between the parent and child by adoption.

The effect of the act cannot be to sever the natural relation existing between the adopted child and its natural parents. The statute contemplates only a living with the adoptive parent, coupled with the right of support and maintenance, and an additional property right of inheritance from the person of the adopting parent alone. The whole scope of the statute is calculated only to secure such benefits to the child as it could not have enjoyed while living with its natural parents. If it was the intention of the legislature to put an end to the natural relation existing between the adopted child and its natural parents, such intention finds no expression in the act in question.

Chief Justice Lowrie in a case\* before the Supreme Court of Pennsylvania, doubted whether the Roman law on the subject of adoption could furnish any valuable analogies to aid in the interpretation of the adoption act of Pennsylvania; "for," says he, "the civil and religious distinctions between differ-

\* *Commonwealth v. Nancrede*, 32 Penn. St. (8 Casey,) 389.

ent *gentes* and between *populus* and *plebs* had much to do with the form of their law of adoption." Still, the language of the learned justice has reference only to the early law of the Romans, as it existed before the time of Justinian. The doctrine of adoption was never known in the English or our common law, and a proper definition of the term, and the exact object and meaning of the legal act of adoption, can only be found in the civil or Roman law; for from that system all the modern states that sanction the practice have derived their rules upon the subject.

It is evident that under the early civil law, before the time of Justinian, when the unit of Roman society was the family, the act of adoption was attended with consequences far different from the results attained under the code of Justinian; for in his time the individual had, to a great extent, become the unit of society, and the law had adapted itself to the change. It will be observed that the act of adoption had no effect whatever upon the relation of the person adopted, with his natural family.

"Until the time of Justinian an adopted son, during his continuance in his adoptive family, had no right of succession to his natural father, but was a *suus heres* of his adoptive father. If he left the adoptive family before the death of his natural father, he was called by the prætor to the succession of his natural father as a *suus heres*, but had of course, no claim on the adoptive father. If he left the adoptive family, after the death of his natural father, he had no claim to the succession of either natural or adoptive father. Justinian, as we have seen in the First Book (tit. II. 2), altered this, and the adopted son, unless adopted by an ascendent, never lost his right to the succession of his natural father, although he gained a right to the succession *ab intestato* of his adoptive father." Inst. (Sancars) 369, lib. III. tit. I. 10. "It is, however, to be observed, that the children still remaining in an adoptive family, or who have been emancipated by their adoptive father after the decease of their natural father, who dies intestate, although not admitted by the part of the edict calling children to the possession of goods, are admitted by another part, by which the

*cognati* of the deceased are called. They are, however, only thus admitted in default of *sui heredes*, emancipated children and *agnati*. For the prætor first calls the children, both the *sui heredes* and those emancipated, then the *legitimi heredes*, and and *cognati*." Inst. (Sandars) 121, lib. 1. tit. xi, *De Adoptionibus*; Gai. 1, 97. "Adoptive children while under the power of their adoptive father, are in the same legal position as children sprung from a legal marriage; and, therefore, they must either be instituted heirs or disinherited, according to the rules we have laid down respecting natural children." Inst. (Sand.) lib. 11, tit. xiii, 4. "*Such was the ancient law.*" Ibid. 5. "Before the time of Justinian the effect of adoption was to place the person adopted exactly in the position he would have held had he been born a son of the person adopting him. All the property of the adoptive son belonged to his adoptive father. The adoptive son was heir to his adoptive father, if intestate, bore his name, etc., \* \* and shared the sacred rites of the family he entered." Inst. (Sand.) 121, lib. 1, tit. xi. For a full account of the ancient Roman law on adoptions, see *Pandectæ Justinianicæ*, auctore R. J. Pothier, Tom. Prim. Parisiis. 1818. Lib. prim., tit. vii, art. iv.

It is evident, therefore, that, even before the time of Justinian, the act of adoption did not effect a complete severance as to the right of inheritance of the adoptive son from the natural father, since the former could be called by the prætor to inherit in the rank of the *cognati*.

"The change made by Justinian in the law of adoption completely altered its character." Inst. (Sand.) lib. 1, tit. xi. "But now, by our constitution, when a *filius familias* is given in adoption by his natural father to a stranger, the power of the natural father is not dissolved; no right passes to the adoptive father, nor is the adopted son in his power, although we allow such son the right of succession to his adoptive father, dying intestate." Inst. lib. 1, tit. xi, 2; Code viii, 48, 10. "Such were the rules that formerly obtained; but they have received some emendation from our constitution, relating to persons given in adoption by their natural parents. For cases have occurred in which sons, who by adoption have lost their succession to

their natural parents, and, the tie of adoption being easily dissolved by emancipation, have the lost right of succeeding to either parent. Correcting, therefore, as usual, what is wrong, we have promulgated a constitution enacting that, when a natural father has given his son in adoption, the rights of the son shall be preserved exactly as if he had still remained in the power of his natural father and no adoption had taken place; except only in this, that the person adopted may succeed to his adoptive father if he die intestate. But if the adoptive father makes a testament, the adoptive son can neither by the civil law nor under the prætorian edict obtain any part of the inheritance, whether he demand possession of the effects *contra tabulas*, or allege that the testament is inofficious; for an adoptive father is under no obligation to institute or disinherit his adopted son, *there being no natural tie between them.*" Inst. lib. III, tit I, 14.

We have now seen that the act of adoption under the later Roman law meant no more than that the son given in adoption to a stranger should be in the same legal position to his natural father, as before the act, and should only gain by adoption the right of succession to his adoptive father, in case the latter were to die intestate; and no greater right was secured to the adopted son; for the adoptive father by making a testament might disinherit the former by omitting to mention the latter in the testament. There was no change whatever effected in the relations subsisting between the adoptive son and his natural family—the tie of blood was still preserved, and with it all the duties and rights arising therefrom.

Returning now to our act of adoption, it is not apparent from the terms of the act, that the legislature enacted anything further than what was intended by the later Roman law, excepting that the third section of the Missouri act imposes upon the adopting parent the duty of maintaining the adopted child. But the right of inheritance given to the child seems to be limited to a taking from the adoptive parent only. The first section of our statute expresses as the purpose of the person wishing to adopt, the "desire to adopt any child or children *as his or her heir or devisee.*" The term "*heir,*" as we



shall hereafter see, means nothing more than the person who has the right under the law to succeed to or inherit from another, in case of the intestacy of the latter. It is plain that this was the meaning intended to be conveyed by the legislature from the use of the term "devisee" in the context.

The act in question can not be construed to affect the duties or rights of any other persons than those of the adopting parent and of the adopted child, and it does not touch the rights of either of these parties otherwise than in giving to the child adopted the right of inheritance from the adoptive parent, upon whom is, at the same time, imposed the duty of maintaining the child.

The tendency of legislation in many of the American states is in accordance with the later Roman law, in that the statutes regulating adoptions in such states, indicate only an intention to have the adopted child gain a right of inheritance from the adoptive parent, and from him alone, and not to give or take away the right of inheritance naturally belonging to other persons, whether related to the adopting parent or adopted child. Yet in some of the states, the early Roman law is to some extent followed, and the adopted child is there placed in the family of the adoptive parent, as if born to him in natural wedlock; while in other states, the rights and duties, gained or lost, partake of the characteristics of both systems.\*

\* Since the compilation of the above article, in the summer of 1873, the writer has, as far as his opportunities have allowed, examined the statute books of the several states respecting the provisions for adoptions therein contained, and has found that twenty-one of the states besides Missouri have laws regulating adoptions.

The statutes in *California, Connecticut, Georgia, Iowa, Kansas, Michigan* and *Vermont* are similar to the Missouri act, and would, perhaps, receive a like construction. 1 Civil Code of Cal. chap. II, sec. 228; Rev. Stat. of Conn. 1866, p. 310; Code of Geo. (2d ed.) 1873, sec. 1788; Code of Iowa, 1873, sec. 2310; Gen. Stat. Kan. 1868, p. 581; 2 Comp. Laws, Mich. 1871, pp. 1488, 1489.

In *Illinois, Massachusetts, Maine, New Hampshire, Rhode Island* and *Wisconsin*, the relation of parent and child, as respects the duties of maintenance, obedience, etc., between the adopted child and its natural parents, is dissolved by the act of adoption. In *Illinois, Massachusetts, New Hampshire, Rhode Island* and *Wisconsin* there is an express pro-

Mrs. Martha Dalrymple cannot take the interest of Julia, deceased, because there was no tie of relationship, either natu-

vision to the effect that the adopted child shall not be capable of taking property expressly limited to the body or bodies of the parents by adoption; nor in *Illinois*, *Massachusetts* and *Rhode Island* property from the lineal or collateral kindred of such parents by right of representation. In *Massachusetts*, however, the adoptive child or person may take property as heir or next of kin of his natural parents or kindred directly or by right of representation. In *Maine* it is further provided that the act of adoption shall not affect any rights of inheritance, either of the child adopted or of the children or heirs of his adopters. Gen. Stat. Ills. (H. B. Hurd) 1874, pp. 128, 129; 1 Suppl. Gen. Stat. Mass. (2d ed.) p. 906; Rev. Stat. Maine, 1871, p. 538; Gen. Stat. N. Hamp. 1867, p. 348; Gen. Stat. R. I. 1873, pp. 326, 327; Rev. Stat. Wis. 1871, pp. 785, 786.

In such of the remaining states as have laws regulating adoptions, the legal relation of parent and child is generally dissolved by the act as far as the duties of maintenance, obedience, etc., are concerned, but the effect of the act of adoption upon rights of inheritance is so different in the various states, that a detailed statement is necessary.

In *Indiana* the adopted child is entitled to take property from the adoptive parent by *descent or otherwise*, as if the natural heir of such parent. Stat. Ind. 1860, p. 301; 2 Ib. 341; 3 Ib. (Davis Suppl.) 220. See *Barnes v. Allen*, 9 Amer. Law Reg. (O. S.) 747; S. C. 25 Ind. 222.

Prior to the new constitution of *Louisiana* (1865), adoption was altogether prohibited in that state; but now "any person or persons, having legitimate issue, may be allowed to adopt any other child, provided that said adoption does not interfere with rights of *forced heirs*." 2 Dig. La. Stat. 1870, secs. 2322, 2326.

The adoption act of *Nebraska* seems to be the most practicable and reasonable of all. The adopted child takes such "rights, privileges and immunities" as the adopting parent desires to bestow, and as are stated in his petition filed in the probate court, before which the procedure of adoption takes place, and the adoption is effected by a decree based upon the prayer of the petition. Gen. Stat. Nebr. 1873, p. 649.

An order of the superior court, upon petition by the adopting parent, signalises the act of adoption in *North Carolina*. The effect of the order is to establish the relation of parent and child, during the minority or for the life of the child according to the prayer of the petition; if for life, the child shall inherit the real estate and be entitled to the personal estate of the petitioner, in case he die intestate, to the same extent as if his actual child. "Provided, such child shall not so inherit and be entitled to personal estate, if the petitioner specially set forth in his petition such to be his desire and intentions." Battle's Rev. Stat. N. C. 1873, p. 72.

In *Ohio* the adopted child becomes the legal heir of the adoptive

ral or by adoption, between the two. The second section of the adoption act (Wagn. 256), provides that "a married woman, by joining in the deed of adoption, shall, with her husband, be capable of adopting any child or children." Mrs. Dalrymple did not join in the deed of adoption. Even if she had, while it would have been very clear that Julia might have inherited from her, it would by no means have followed that

parents, as if begotten in lawful wedlock, "provided, that on the decease of parents, who have adopted a child or children under this act, and the subsequent decease of such child or children without issue, the property of such adopting parents shall descend to their next of kin, and not to the next of kin of such adopted child or children." If, therefore, the case that we are above discussing under the law of Missouri, were to occur in Ohio, an opposite conclusion would be reached. Swan & Critch. Ohio Stat. pp. 506, 507.

In *Pennsylvania* it is provided that if the adopting parent shall have other children, the adopted child shall share the inheritance only as one of them, in case of intestacy, and he, she, or they shall respectively inherit from and through each other, as if all had been the lawful children of the same parent. Brightly's Purdon's Dig. Laws of Penn. 1873, p. 61. See *Commonwealth v. Nancrede*, 32 Penn. St. (8 Casey) 389, where the court says: "Giving an adopted son a right to inherit does not make him a son in fact, and he is so regarded in law only to give him the right to inherit." See also, *Shafer v. Eneu*, 54 Penn. Stat. 304.

In *Tennessee* adoptions are effected by decree of the circuit or county court, upon petition. "The effect of such adoption, unless expressly restrained by the decree, is to confer upon the person adopted all the privileges of a legitimate child to the applicant, with capacity to inherit and succeed to the real and personal estate of such applicant, as heir and next of kin; but it gives to the person seeking the adoption no mutual rights of inheritance and succession, nor any interest whatever in the estate of the person adopted." 2 Rev. Stat. Tenn. 1873, pp. 1507, 1508.

The Mexican law, which was in force in 1832, in *Texas*, did not permit any one who had a legitimate child living, to adopt a stranger as co-heir with such child. *Teal v. Sevier*, 26 Tex. 520. But now adoptions are legal, and the adopted child becomes the heir of the adoptive parent. It is "provided, however, that, if the party adopting such person have, at the time of such adoption, or shall thereafter have, a child or children begotten in lawful wedlock, such adopted child or children shall in no case inherit more than the one-fourth of the estate of the party adopting him or her, which can be disposed of by will."

Mrs. Dalrymple could have inherited from Julia. As it was, the relation of the former to the latter, under the will, was, at most, that of testamentary guardian.

As has already been remarked, the only object intended by the legislature was to secure a benefit to the adopted child from the adopting parent. There can be no legal inference that a relation is created by the statute between the adopted child and any of the kin or heirs of the adoptive parent, such that on the decease of the child a right of inheritance accrues from the latter to such kin or heirs. For there is no natural tie between the two, nor does the act, whether in terms or by implication, create such tie as would give rise to the right of inheritance from the adopted child to any of the kin or heirs, lineal or collateral, of the adoptive parent, or from such kin or heirs to the adopted child. Nor can it be inferred that the adoptive parent can inherit from the adoptive child. The only right of inheritance given by the statute is the right of the adopted child to take from the adopting parent, directly. There is no indication whatever that such right was to be reciprocal.

We conclude, therefore, on this point, that since there was a vested remainder in the adopted daughter, Julia, at her decease, her interest in the estate, real and personal, passes to her natural heirs under the statute of descents and distributions—to her brothers and sisters, children of Charles and Rosetta La Place. For the effect of the act of adoption is neither such as to destroy the natural tie existing between the adoptive child and her natural family, nor such as to create a right of inheritance from the adopted child, to any kin, relative or heir of the adoptive parent.

The construction to be placed upon the provision in the fourth clause of the will, "and the other half shall go to the nearest and lawful heirs of mine and that of my said wife, share and share alike," is such that: (1) The two nephews of the testator, living at his death, take as parceners, under the statute of desc. and dist., a vested remainder in one half of the remaining half, or in one-quarter of the whole of the personal and real estate of the testator, after the termination of the life

estate of Mrs. Dalrymple in the same. (2) The remaining interest in the other quarter of the personal and real estate of the testator, after the termination of the life estate in Mrs. Dalrymple, is a contingent remainder, which is to vest in parcenary under the statute of desc. and distr. in those persons, who shall have been ascertained to be the heirs of Mrs. Dalrymple at her decease.

The meaning of the term "heirs," is, in all cases, a question of intention, and is open to enquiry. *Williamson v. Williamson*, 18 B. Monr. 329; *Bailey v. Patterson*, 3 Rich. Eq. 156; 2 Red. on Wills, 390, and cases cited; 2 Jarm. on Wills, 2; 2 Wms. on Exec. (2d Am. ed.), 808, 809. But when the words, "heirs," "next of kin," "relations" are used in wills, and there is no other definite statement as to what persons are meant to take, the words are construed to refer to such persons as are pointed out as heirs in the statute of descents and distributions. 2 Redf. on Wills, 398, 399, *et seq.*; that is, the word "heir" or "heirs" is, under such circumstances, taken in a technical sense. Technical words, in the absence of explanation upon the face of a will, are to be taken in a technical sense. *Grandy v. Sawyer*, Phill. (N. C.) Eq. 8; *Kiser v. Kiser*, 2 Jones (N. C.), Eq. 28; *Eddings v. Long*, 10 Ala. 203; *Baskin's Appeal*, 3 Barr, 304; *Love v. Buchanan*, 40 Miss. 758; *Evans v. Godbold*, 6 Rich. Eq. 26; *Porter's Appeal*, 45 Penn. St. 201; and in this case the use of the word, "lawful," in context, seems expressly to indicate that the testator refers to the statute of descents and distributions. *Girard's Heirs v. Philadelphia*, 2 Wall. Jr. 301; *Lyon v. Acker*, 33 Conn. 222.

The use of the word "nearest," prefixed to "lawful heirs," does not vary the import, since the statute itself points out who the nearest "heirs" are, and this is the very object of the arrangement of successive classes according to the degrees of consanguinity. *Whithom v. Harris*, 2 Ves. Sen. 527; *Pyatt v. Pyatt*, 1 Ves. Sen. 335; *Marsh v. Marsh*, 1 Br. C. C. 293; *Smith v. Campbell*, 19 Ves. 400; *Clifton v. Holon*, 27 Geo. 321.

The will points out two distinct classes of heirs to take "the other half," "the nearest and lawful heirs of mine and that of

my wife." The grammar is bad, but the meaning may be determined. 1 Redfield on Wills, 465. It is a fact that Mr. Dalrymple and wife had no joint heirs, the former having died without issue. The heirs of the wife, will, therefore, be an entirely distinct class or stock from those of the husband and besides, the former cannot be ascertained until the decease of Mrs. Dalrymple, while those of the husband are already ascertained. There is no other mode of distribution practicable than an equal division of "the other half," or one quarter of the whole estate remaining at the decease of Mrs. Dalrymple, to each class or stock. And the words "share and share alike" must be construed as referring to such a distribution. *Grandy v. Sawyer*, Phill. (N. C.) Eq. 8; *Miller's Appeal*, 35 Penn. St. 323; which announce the true rule to be observed, contrary to that held in the case of *Witmer v. Ebersale*, 5 Barr, 458. See also *Holbrook v. Harrington*. 16 Gray, 102; 7 Allen, 76; *Bassett v. Granger*, 100 Mass. 348; *Alder v. Beal*, 11 Gill & J. 123; *McMilledge v. Barclay*, 11 Serg. & R. 103.

The distribution of one quarter of "the other half" to the husband's heirs, the two nephews living at his decease, gives them a vested remainder; for they were *in esse* and ready to take at the death of the testator. The interest they are to take is determined, the time of its enjoyment being postponed until the decease of the life tenant, Mrs. Dalrymple. It is a settled rule of law, that if a devise can take effect as an estate in remainder, it shall be so regarded rather than as an executory devise. *Purefoy v. Rogers*, 2 Lev. 39; 2 Saund. 380; *Goodright v. Cornish*, 4 Mod. 256, 258; *Doe v. Provost*, 4 Johns. 61. It is equally well settled that if a remainder can take effect as vested, it is to be so regarded rather than as contingent. *Chew's Appeal*, 37 Penn. St. 23; *Young v. Stover*, *Ib.* 105; *Collier's Will*, 40. Mo. 287; 2 Wash. on Real Prop. (3d ed.) 508.

The interest in the remaining quarter is a contingent remainder, which is to go to those persons who shall have been ascertained to be the wife's heirs at her death. For until then, there can be no vesting, because the person designated will not have been ascertained. 2 Wash. on Real Prop. (3d ed.), 524;

Richardson v. Wheatland, 7 Metc. 169; 4 Pick, 198; 4 Gray, 357. And that a vested and contingent remainder may be limited in the same clause of a will when the classes that are to take are different, as they are in this case. See Dixon v. Picket, 10 Pick. 517.

SIMON OBERMEYER.

## VII. THE REPORTERS AND TEXT WRITERS.

*Alison on the Criminal Law of Scotland.*—"An excellent treatise." 1 Taylor Ev. sec. 879. 6th ed.

*Alison on the Practice of the Criminal Law of Scotland.*—"An able and philosophical treatise." 2 Taylor Ev. sec. 1270, note.

*Archbold (John Frederick).*—"Mr. Archbold's works are remarkable for their accuracy, and all his works are prepared with the greatest care. I have had occasion to consult them on several occasions." Pollock, C. B., in *Regina v. Webb*, 2 C. & K. 939. As reported in *Temple & Mew C. C.* p. 28; "Generally speaking, Mr. Archbold's publications are remarkable for their accuracy, and I know no person who has contributed more to the profession, by his great diligence and learning." But in *Regina v. Ion*, 2 Denison C. C. 488, when the eleventh edition of Archbold's *Criminal Pleading* by Welsby was cited, the same learned judge said that Mr. Welsby was "not yet an authority."

*Benjamin on Sales.*—"The most recent work, and a very able one." *Smoot's Case*, 15 Wallace, 48.

*Brown's Chancery Cases.*—"Comparing the Registrar's Book with the report, a doubt may arise whether Lord Thurlow intended that the decree should be, as it was, finally entered. The report in Brown is confused, and the marginal note is incorrect. The concluding words of the report are not very clear. The passage should probably stand thus," etc. *Note on Stone v. Theed*, 2 Bro. C. C. 243; 5 Hare, 453.

*Burrow, Douglas, Cooper, Durnford and East.*—"The very best law reports that have ever appeared in England." Lord Campbell, *Lives of the Chief Justices*, vol. II, p. 405.

*Chabot (Mr. Charles, Expert).* *The Handwriting of Junius Professionally Investigated.*—"This is the most instructive and scientific essay that has ever been published in English respecting the best methods to be adopted in comparing handwritings. It deserves the most attentive study, and it quite



exhausts the subject." 2 Taylor Ev. sec. 1669, note. 6th ed.

*Chancery Cases.*—"Lord Redesdale has said that the 'Chancery Cases' are very incorrect, and Lord Manners has said the book is one of very doubtful authority. However incorrect the Chancery Cases may have been, the author seems at any rate to have had an accurate notion of one of the fundamental rules of pleading." 1 Coop. Temp. Cott. 518, Note.

*Cockburn and Rowe's Reports.*—The present Lord Chief Justice of the Court of Queen's Bench is to be classed among the English judges who have been reporters. The work of Cockburn and Rowe ceased on the completion of a single volume. In the preface they state that "they could have much wished to have followed the example of Mr. Douglas and Mr. Peckwell, in giving an introductory digest of the result and effect of the different decisions;" "but the extent of the changes introduced by the new law, both in principle and practice, was so great that no time was to be lost in publishing the most important points as they severally arose. Accordingly the volume was issued in parts, and we are left without that summary which the logical conciseness of one of the editors could well have supplied. Of the way in which these reports were composed, we have a fair test in the contemporary reports of Perry and Knapp. Both are skilful abridgments of the evidence and of the arguments; but to Cockburn and Rowe's belongs the superior merit of perspicuity, without elaboration, and of greater facility of reference." The London Law Magazine, vol. XLVI, p. 194.

*Coke's Institutes.*—"His law books were still his unceasing delight; and he now (A. D. 1629-1634), wrote his Second, Third, and Fourth Institutes, which, though very inferior to the First, are wonderful monuments of his learning and industry." Lord Campbell, Lives of the Chief Justices, vol. 1. p. 335. In the Queen v. Chidwick, 11 Q. B. 233, Lord Denman, C. J., citing the Second Institute, speaks of it as "the most valuable of Lord Coke's works."

*Corner's Practice.*—"We deem it but proper to express our opinion of this excellent work, to which frequent reference is made in our Digest. It contains, we believe, a very accurate

and valuable detail of the practice on the crown side of the Court of Queen's Bench." 8th Rep. of the Eng. Crim. Law Comm. p. 5.

*Dickens' Reports.*—"Much may, no doubt, be said against the accuracy of the reports in Dickens; but there are many of them, in which he himself interfered and made suggestions to the court. And I have always considered these cases of higher authority than the rest, because you have there an opportunity of seeing what was suggested by a very experienced officer, and what the court did in consequence." Lord Chancellor Cottenham in *Fisher v. Fisher*, 2 Phillip, 240. With respect to the case before him, however, the Lord Chancellor considered that the case might be trusted.

*Dyer's Reports.*—"I myself am bound to honor Sir James Dyer as the first English lawyer who wrote for publication 'Reports of Cases' determined in our municipal courts—being followed by a long list of imitators, containing my humble name. I am afraid that the hope of immortality from law reports is visionary. But Dyer may really be considered as the Shakespeare of law reports, as he had no predecessor for a model, and no successor has equalled him. As yet his fame flourishes, and those who are most competent to appreciate his merit have praised him the most. Thus writes that great lawyer, Sir Harbottle Grimston: 'If we have since failed in the number of the persons reporting, it hath been amply recompensed in the grandeur and authority of one single author, Sir James Dyer, Chief Justice of the Common Pleas, by whose great learning and assiduous study, the said judgments and law resolutions have been transmitted and perpetuated until the twenty-fourth year of the reign of the late Queen Elizabeth.' Preface to *Cro. Eliz.*" Lord Campbell, *Lives of the Chief Justices*, vol. 1, pp. 178, 192.

Thus wrote Fulbecke in his *Direction or Preparative to the Study of the Law*, A. D. 1600: "The two late reporters are Mr. Plowden and Sir James Dyer, who by a several and distinct kind of discourse, have both labored to profit posterity. Some humours do more fancy Plowden for his fulness of argument, and plain kind of proof; others do more like

Dyer for his strictness and brevity. Plowden may be compared to Demosthenes, and Dyer to Phocion, both excellent men, of whom Plutarch reporteth, that such things as were learnedly, wittily, copiously, and with admiration detailed, and delivered at large by Demosthenes, were shut up in few words, compendiously recited, and with admiration handled of Phocion."

"The marginal notes in Dyer are good authority; they were written by Lord Chief Justice Treby." Buller, J., in *Milward v. Thacher*, 2 T. R. 84. Gibbs, C. J., delivering the opinion of all the judges, 4 Dow. 202.

*Durnford and East's Reports, called par excellence the "Term Reports."*—In the preface it is said: "In a work of this kind all that can be expected is accuracy; to polish and digest properly requires long time and much labour." For care and accuracy of finish, and a matchless propriety of style, which they everywhere maintain, these reporters have never been surpassed. See *Burrow*.

*Finch's Law*.—Lord Keeper Finch wrote this treatise, which, till the publication of Blackstone's Commentaries, was the chief elementary text-book for the law student. "From his preface," writes Lord Campbell, "he seems to have had himself a very high opinion of his own performance, and to have thought it of infinitely greater importance than the *Novum Organum*: 'Inter innumeros tam augustæ disciplinæ alumnos, surrexit adhuc nemo, qui in eo elaboravit ut rerum præstantiam methodi præstantia consequatur. Aut ego vehementer fallor, aut superavi rei vix credendæ difficultatem maximam; syrtesque et scopulos, Scyllam et Charybdin præternavigavi.'" *Lives of the Lord Chancellors*, vol. III, p. 244.

*Finlason's Leading Cases in Pleading*.—"These views, thus expressed by this author, are by no means supported by the cases and authorities to which he refers." *Alcock v. Hopkins*, 6 Cush. 492.

*Fortescue (Baron)*.—The exquisite burlesque on the old reports, entitled "*Stradling v. Styles*," is often erroneously attributed to Swift and Dr. Arbuthnot; but it seems really to have been the joint composition of Pope and Mr. Fortescue (af-

terwards, in 1736, made a Baron of the Exchequer), and who was, says Sir Walter Scott, "*though* a lawyer, a man of great humour, talents and *integrity*." Swift's Works, vol. XIII, p. 138, ed. Scott.

*Hardwicke (Lord)*.—"The opinions of Lord Hardwicke on questions not affecting the liberty of the subject, command the highest respect. But he was, as Mr. Hallam well observes, 'a regularly bred crown lawyer, and in his whole life disposed to hold very high the authority of government.'" 3 Hallam's Const. Hist. (9th ed.) 287. Dissenting opinions of Thomas, J., in *Commonwealth v. Authes*, 5 Gray, 298.

*Hargrave's Law Tracts*.—"All the cases on this subject will be found collected and commented on with great ability," in this book. Williams on Executions, vol. I. p. 523, note 6th ed.

*Hull (Mr. Justice)*.—"I know that a more cautious or conscientious judge never sat upon the bench." Cockburn, C. J., in *Regina v. Charlesworth*, 1 Best & Smith, 506.

*Holt (Lord Chief Justice)*.—"He is said by Lord Lindhurst to have been the greatest of all our judges." Whiteside, C. J., in *Mulcahy v. The Queen*, Irish Rep. 1 Com. Law, 30. "No English lawyer," wrote the late Mr. John William Smith, "ought ever to pronounce the name of Lord Chief Justice Holt without great veneration. Indeed, I have no hesitation in saying that Lord Holt alone accomplished more for English mercantile law than the whole body of English judges prior to his elevation." Mercantile Law, Introduction, p. 10.

*Holt, Cases Temp.*.—"I do not allow this to be a book of authority, yet this case seems to be a copy from his lordship's manuscript." Lord Chancellor Hardwicke in *Sparrow v. Hardcastle*, 3 Atk. 806.

*Hullock (Baron)*.—"A sounder lawyer or stronger headed man never was known in the profession." Park, J., in *Rex v. Long*, 4 C & P. 406.

*Kenyon's Reports*.—"He diligently attended the courts at Westminster, and took copious notes of the arguments at the bar and of the judgments. His notes he methodised in the evening into respectable reports, which were afterwards very useful to him, and of which two volumes, containing cases

1753 to 1759, were published in the year 1819. I cannot much praise the style of the reporter, for he was careless about grammar, and he had no notion of elegant composition;\* but he shows that he perfectly well understood the points which were discussed and decided." Lord Campbell, *Lives of the Chief Justices*, vol. III. p. 7.

The weight and credit attributed to his Reports by his contemporaries, are clearly evinced in the case of *Fonnerau v. Fonnerau*, 2 Dougl. 506, where Lord Mansfield directed another argument to be made, solely on the ground of a different reason for a prior decision being contained in the note of Mr. Kenyon, from that stated in the report of Sir James Burrow.

*Latch's Reports*.—This book is confessedly but a copy made by Latch from some other book. "Reader!" appeals the editor of Latch, in pompous and lying solemnity, "the testimonials of many sages of the law, the judges and his contemporaries, give you an assurance, above all I can express, that the original of this impression was all written by that worthy person's own hand." In the preface to Palmer's Reports it is said somewhat snarlingly, that the cases in Latch are reported "correctly enough."

*Leach's Crown Cases*.—The fourth edition, A. D. 1815, is the only one reliable. It is prudent to consult the contemporaneous reporters, especially that work of superior excellence, East's Pleas of the Crown, which contains a report of many cases reported by Leach.

*Lewin on Trusts*.—5th ed. 1867. The last edition is "a remarkably full and clear exposition of the law of trusts, as administered in England." Perry on Trusts, Preface.

*Littledale (Mr. Justice)*.—"An accomplished pleader." Lord

\*The Term Reports, when they use the very language of Lord Kenyon, often contain a series of broken metaphors. For example: "If an individual can *break down* any of those safeguards which the constitution has so wisely and so cautiously erected, by *poisoning* the minds of the jury at a time when they are called upon to decide, he will *stab* the administration of justice in its most vital parts." Townsend's *Lives of Eminent Judges*, vol. I. p. 79.

Lyndhurst, L. C., in *O'Connell v. The Queen*, 11 Clark & Finnelly, 316.

*Living Authors.*—In 1837, when East's Pleas of the Crown was cited, Park. J., remarked that living authors were not to be cited as authorities. *Rex v. Atkinson*, 7 C. & P. 671. See *Archbold, John Frederick*."

*Mirroure of Justices.*—In the course of the argument in *Sutton v. Darke*, 5 H & N. 647, the following passage from Reeve's History of the English Law was quoted: "This book should be read with great caution, and some previous knowledge of the law as it stood about the same period, for the author certainly writes with very little precision." Vol. II. p. 358. Martin, B., observed: "Some doubt was expressed as to the authority of the *Mirroure of Justices*; but it is spoken of by Lord Coke in the highest terms."

*Mitford on Pleading.*—Mr. Walpole, of the Equity Bar, a relative of Lord Redesdale, in one of his lectures on equity, at the Law Institution, made the following interesting statement concerning this work:—

"I can not refrain from adding, as the greatest encouragement to all of you who are just commencing your professional career, that Lord Redesdale's Treatise on Pleading was written by a man who had been trained in a solicitor's office; but by study and persevering industry, æquabiliter et diligenter (as his own motto describes it), rose to be Lord Chancellor of Ireland. It was composed, moreover, not for ambition, or for profit, but simply in the course of his duties, for the education of another man, at that time only his pupil, and who profited so greatly by its profound learning, and gained from it such a thorough knowledge of sound principles, that not long after the retirement of his gifted instructor, that pupil succeeded him in the same distinguished office—I mean the present Lord Manners."

*Park on Insurance.*—"This copious treatise by Mr. Justice Park is composed almost entirely of the decisions and dicta of Lord Mansfield." Lord Campbell, *Lives of the Chief Justices*, vol. II, p. 405.

*Patteson (Mr. Justice Patteson).*—"He will always be to me

an oracle of the law." Lord Campbell, C. J., in *Holloway v. The Queen*, 17 Q. B. 328.

*Phillimore (Dr. Robert) on the Law of Domicil*.—"Erudite and valuable." Williams on Executors, vol. 1, p. 1517, note. 7th ed.

*Phillip's on Insurance*.—"I know of no text writer who treats the law of insurance with more learning, and certainly of none who treats it with as much sound sense and appreciation of the bearing of the doctrines laid down on practical business." Blackburn, J., in *Rankin v. Potter*, 42 L. J. C. P. 191; L. R. 6 H. L. 128.

*Pigott on Common Recoveries*.—"Pigott, who was as able a conveyancer as man of the profession, has confounded himself and everybody else that reads his book, by endeavoring to give reasons for, and explain common recoveries. I only say this to show that when men attempt to give reasons for common recoveries they run into absurdities, and the whole of what they say is unintelligible jargon and learned nonsense." Willes, C. J., in *Martin v. Strachan*, 1 Wils. 73.

*Plowden's Reports*.—See *Dyer's Reports*.

*Popham's Reports*.—"Popham is to be reckoned among the English judges who were authors, having compiled a volume of reports of his decisions while he was Chief Justice of the King's Bench, beginning in the 34th and 35th of Elizabeth. Being originally in French, an English translation was published in the year 1682, but they are wretchedly ill done, and they are not considered of authority. We should have been much better pleased if he had given us an account of his exploits when he was chief of a band of freebooters." Lord Campbell, *Lives of the Chief Justices*, vol. 1, p. 229.

"The opinion in *Popham*, 126, which my brothers rely on, is of no authority; for it is amongst the additional cases, and not reported by Popham; and there is no mention made of it in the report of the same case in *Cro. Jac.* 434." Holt, C. J., in *Fisher v. Wigg*, 1 P. Wms. 17.

*Powel (Mr. Justice)*.—"An able and learned judge, as I have always understood him to be traditionally reputed." Sir W. Scott in the *Gratitudine*, 3 Chr. Rob. 269.

*Rastell's Entries*.—"A book of the greatest authority." Lawrence, J., in *The King v. Wilson*, 8 T. R. 362. "A book of authority." 2 Hawk. P. C. ch. 28, p. 87.

*Raymond's (Lord) Reports*.—"His professional prosperity he himself ascribed to his habit of reporting. He was determined to rival, and he greatly excelled, the fame of his father in this line. Not only when he was a student, but when called to the bar, when attorney-general, and when chief justice, he wrote an account of all the most remarkable decisions in the Court of King's Bench, giving the arguments of counsel and the opinions of the judges with admirable point, vigor, and exactness." Lord Campbell, *Lives of the Chief Justices*, vol. II. p. 190.

*Reformatio Legum Ecclesiasticarum*—The Reformation of the Ecclesiastical Laws as attempted in the reign of King Henry VIII., King Edward VI., and Queen Elizabeth. A new edition by Edward Cardwell, D.D., 8vo. Oxford, 1850.

This body of laws was framed by a commission of eminent divines and civilians, under the superintendence of Archbishop Cranmer, who was assisted in the compilation by the pens of Dr. Walter Haddon, Sir John Cheke, and Peter Martyr. See Dr. Cardwell's Preface. This work is spoken of by Sir W. Scott "as a work of great authority in determining the practice of these times, whatever may be its correctness in matters of law." *Hutchins v. Denziloe*, 1 Hag. Con. 179.

*Registrum Brevium*.—"This book is a collection of writs which Lord Chief Justice Hengham had carefully made and revised, which is pronounced by Lord Coke to be the most ancient book on the law.\* He means of permanent authority in the common law; which earlier treatises could not be considered." Lord Campbell's *Lives of the Chief Justices*, vol. I. pp. 72, 73, and note.

*Rolle's Reports*.—"Remarkable for their clearness, precision, and accuracy." Lord Campbell, *Lives of the Chief Justices*, vol. I. p. 433.

*Sanchez (Thomas) Disputationum de sancto Matrimonii Sacra-*

\* 4 Inst. 140, 3 Rep. Preface, p. VII.



*mento: Tomi tres.*—3 vols. in 2, fol. Antverpiæ, 1614. Another edition, 3 vols in 1, fol. Lugduni, 1654. "The works of Sanchez are considered as of authority." Lord Denman, C. J., in *Regina v. Chapman*, 2 C. & K. 856.

*Saunders's Reports.*—"Saunders was not likely to have overlooked any objection to a declaration." Williams, J., in *Beer v. Beer*, 12 C. B. 75.

*Strange's Reports.*—"This direction of the chief justice the reporter hath totally omitted; and therefore, I have taken the liberty to state the case more largely than otherwise I should have done. And I cannot help saying, that the circumstances omitted in the report are too material, and enter too far into the true merits of the case to have been dropped by a gentleman of Sir John Strange's abilities and known candor, if he had not been over-studious of brevity. Imperfect reports of facts and circumstances, especially in cases where every circumstance weigheth *something* in the scale of justice, are the bane of all science that dependeth upon the precedents and examples of former times." Foster's Crown Law, 294.

*Tenterden (Lord).*—"A judge of great experience in criminal law." Lord Lyndhurst, L. C., in *O'Connell v. The Queen*, 11 Clark & Finnelly, 316.

*Viner's Abridgment.*—Mr. Hargrave, in his edition of Coke on Littleton, 9a, note 3, says: "He is the more frequent in his references to Viner's abridgment, because it tends to facilitate the use of that immense body of law and equity, which, notwithstanding all its defects and inaccuracies, must be allowed to be a necessary part of every lawyer's library." Mr. Preston (Ed. Sheppard's Touchstone, p. 122), after quoting this passage, continues: "The advantages attending frequent references to the abridgments and digests, it is presumed, are too obvious to require to be pointed out. The reader thereby has before him, in one view, all the cases on the point, which are by far too numerous to be inserted in a note, even if they were all correspondent and did not vary in their circumstances or decisions."

*Thurlow (Lord).*—"His reported judgments are for the most very imperfectly executed." Twiss; Life of Lord Eldon, vol. III.

p. 464. They are reported by Brown, Vesey, Jr., and Dickens. "It may be partly their fault, but he certainly appears in their reports to little advantage." Lord Campbell, *Lives of the Chancellors*, vol. vi. p. 196, 5th ed.

*Wentworth's Office of Executors*.—"A book of considerable authority." Williams on Executors, vol. i, p. 14, 6th ed.

*Whartonus (Henricus). Anglia Sacra, sive Collectio Historiarum de Archiepiscopis et Episcopis Angliæ, a prima Fidei Christianæ susceptione ad annum 1540.* 2 Vol. fol., London, 1691.—"A book undoubtedly of great interest; not merely, be it remembered, a modern work—to speak as modern of any work written in the seventeenth century,—not merely an original work of the author at that time, but, as it appears from examining into it, in great part a collection from ancient, and some of them contemporary writers." Coleridge, J., in *The Queen v. Archbishop of Canterbury*, 11 Q. B. 590.

*Wheaton's Reports*.—The Hon. Daniel Webster thus concludes an interesting review of the third volume: "We wish to express our high opinion of the general manner in which the reporter has executed his duty in the volume before us. Mr. Wheaton has not only recorded the decisions with accuracy, but has greatly added to the value of the volume by the extent and excellence of his notes. In this particular his merits are, in a great degree, peculiar. No reporter in modern times, as far as we know, has inserted so much and so valuable matter of his own. These notes are not dry references to cases,—of no merit, but as they save the trouble of research,—but an enlightened adaptation to the case reported, of the principles and rules of other systems of jurisprudence, or a connected view of decisions on the principal points, after exhibiting the subject with great perspicuity, and in a manner to be highly useful to the reader. Mr. Wheaton's annotations evince a liberal and extensive acquaintance with his profession. His quotations from the treatises of the continental lawyers, are numerous and well selected." *The North American Review*, vol. III. p. 71.

F. F. HEARD.

## VII. THE BENCH AND BAR OF THE SOUTH AND SOUTHWEST.

At the special request of the editor of the SOUTHERN LAW REVIEW, I propose to say something, at this time, in reference to the bench and bar of the Southern and Southwestern states. This is indeed a most suggestive subject, and would well admit of being discussed in several different modes, neither of which would perhaps be altogether devoid of entertainment or of instruction. In this (which may or may not be a mere initial number, according to circumstances) I could have but little hope of making any very decided impression upon the minds of any considerable portion of my countrymen. It would be gratifying to me to find out that I had been at least so far successful in this hasty and imperfect essay, as to attract the attention of liberal-minded and enterprising individuals in our midst, to the importance of collecting and preserving in some mode the rich materials yet existing for the future composition, by some competent and judicious writer, of the history of the eminent jurists and advocates, who, in former days, delighted and edified the men of their own generation, either by the spoken eloquence of the forum, or the more grave and authoritative exposition of those principles of law and order which lie at the very foundation of all enlightened and prosperous commonwealths.

It has long been asserted by men whose words are entitled to much respect, that in all communities enjoying free institutions, and especially in such of them as have become remarkable for commercial growth and consequence, *mind* and *money*, that is to say, cultured intellect and accumulated wealth, are unequalled elements of power, and are capable, when thrown into combination, of wielding an almost irresistible influence over the concerns of the whole body politic. Experience has more than once most signally demonstrated that when the possessors of actual capital, in the various forms which it is

capable of assuming, become in any way very closely affiliated with those classes of population whose native intellectual energies have been expanded and invigorated by scientific culture, these eventually become, for many purposes, a *single class* or association, more or less organized for action, and are sometimes seen to gain an ascendancy only to be counter-vailed by a resort to something like revolutionary expedients, rarely less mischievous in their effects than the evils sought to be removed by their instrumentality. In this view of the subject it would seem impossible to over-estimate the importance of preserving in the bosom of the dominant classes referred to, all the higher social virtues in their fullest vigor, in order that the power which they are capable of bringing into exercise may not be so applied as either to engender wide-spread social demoralization or bring about the destruction of civil liberty itself.

When the celebrated French writer, DeTocqueville, visited this country, some years since, he took occasion in the justly celebrated work which he then published upon Democracy in America, to assert, as the result of his own personal observation, that in all our great commercial cities, the merchants or men of trade, and the lawyers, constituted what he deemed a veritable aristocracy. This was, perhaps, a somewhat overstrained declaration, but has, nevertheless, this foundation, that these two singularly alert and vigilant classes of our people are often found in such close association as to give them the appearance of acting with *united counsels*, influenced, as in such cases they seem to be, by the same motives of action, following the same schemes of speculative emolument, and, perhaps naturally enough, seeking to mould the general legislation of the country in such forms as to give undue protection and furtherance to particular class-interests, at the expense of the general welfare, and to the deep and irreparable detriment of other portions of the community of a more sluggish and inactive character. It may be safely asserted that at least nine-tenths of all the laws from time to time enacted, owe their origin, directly or indirectly, to the associated influence of the two classes under consideration. The administration of law

in our courts of justice, which in many instances is really equivalent in practice to the exercise of the law-making power itself, is, naturally enough, devolved almost exclusively upon those who chance to have made our system of jurisprudence a subject of special study. Those who know precisely what laws are already in existence, and who are familiar with the various, and often directly conflicting interpretations to which they have been subjected, are, reasonably enough, presumed to be able to decide what new laws are at any moment necessary, or what modification of existing statutes experience and the progress of society shall have rendered expedient. The commercial or moneyed class has never yet failed to make its wishes, as to additional legislation, known to the law-making department, and has seldom failed to find in our legislative assemblies, both state and national, ready and skillful agents to facilitate the adoption of the amendments desired.

It is often justly mentioned as a circumstance highly honorable to the legal profession, that in almost all ages and countries, eminent jurists have been found who proved themselves to be just and patriotic men, and firm protectors of liberty. Mr. Burke is known to have remarked, on a particularly grave and interesting occasion, in the British Parliament, when our struggle for national independence was in progress, upon the fact that both in the colonial legislatures of that period, and in the first Congress of the Union which ever sat, a much larger proportion of lawyers were occupants of seats in those bodies than had been elsewhere known, and he attests in very emphatic language the learning and ability of the American lawyers of that time, their sterling patriotism, and their skill in drafting the great state papers which were then promulged, and which yet command the general admiration of refined and cultivated minds in all civilized countries.

With the members of my own profession, as a class, I have long had much familiarity in some nine or ten states of the Union, and I take pleasure in attesting that I have derived from my intercourse with them, much, both of gratification and instruction. Were I to indulge in indiscriminate commendation of all those whom it has been my fortune to meet in the

contests of the forum, or the incidents of whose professional career have been brought to my notice, I should greatly wrong my own self-respect and do egregious injustice to the public at large; but I am certain that I do not go too far in declaring that in the various states which I have from time to time visited, in the progress of a now somewhat protracted professional career, I have found my brethren of the bar, with a few exceptions, intelligent, astute, laborious, upright and manly in their conduct, cherishing a high and delicate sense of individual honor, and displaying, on all proper occasions, a proper regard for the dignity of their own calling, as well as a profound respect for the example and counsels of those illustrious sages who have earned undying renown in the judicial annals of our own country and of England.

It has now been a little more than fifty years since I migrated from my own native state, and entered for the first time a court-house in that region where my subsequent life has been chiefly spent—a region *then*, in all respects so eminently prosperous and happy, and *now*, alas! so wretched and forlorn. The court-house to which I have just referred was situated in the town of Huntsville, and in the state of Alabama. An interesting case was under trial. An upright and enlightened judge was presiding, the bar was filled with learned and well-dressed attorneys, and an immense assemblage of citizens was in attendance. Arthur F. Hopkins was addressing a jury of singularly good-looking men, and I soon became deeply interested in the speech which he was most impressively enunciating. I had never before seen him, but had often heard him spoken of in terms of marked respect and commendation. There were opposed to him several lawyers of standing, who afterwards attained a most extended and enviable reputation, both as jurists and statesmen. Among these was Clement C. Clay, who was afterwards a worthy member of the national senate, and whose son of the same name, after a long course of trials and sufferings, which I rejoice to know he has encountered with singular dignity and composure, yet survives. I do not remember often to have enjoyed a higher intellectual treat than the trial of the case referred to afforded me. Judge

Hopkins, afterwards so distinguished as a member of the supreme bench of his adopted state, was then just in his prime. He was of a most impressive and winning aspect; perfectly dignified and self-possessed, though full of earnestness and energy. He possessed a most easy and graceful delivery; exhibited remarkable powers of argument, and was, upon the whole, one of the most polite, affable and gentlemanly persons that ever left the venerated state of Virginia to seek fortune and fame in the far southwest. Though he was then only about thirty-five years old, he was universally admitted to have made himself a complete master of his profession. He was reported to have been for some years a most diligent and assiduous student of the law, and to have possessed himself of much and various learning in other departments of science. In after years I enjoyed his personal intimacy and friendship, and I found him every day and hour growing in my affection and esteem. He died a few years since universally respected and lamented by his numerous friends and admirers. Judge Clay, whom I have mentioned as also speaking on this occasion, was a man of highly prepossessing appearance. He had also been born on the soil of Virginia, but had been reared to manhood in East Tennessee. He was about six feet in height, well-shaped, and easy in his movements, bland and courteous in his manners, and of a personal courage never called in question. He had rather a redundant suit of jet-black hair; his eyes were dark and lustrous, and they positively blazed in their sockets when he was under special excitement. I heard both these gentlemen often afterwards, and never had any reason to modify my first favorable impressions in regard to them.

I have stated that at the time to which I have referred the bar of Huntsville was crowded with attorneys. I have not space at this time for the mention of many of them, and of those whom I am about to mention it is not convenient at present to speak in such terms as their merits would well justify. Among these was Judge William Kelley, a native of Tennessee, a man of most brilliant intellect, of great originality, full of learning of almost every kind, of surpassing ingenuity and logical dexter-

ity, copious in illustration, almost to profuseness; at times most touchingly eloquent, and with a rich and fervid imagination; possessing an inexhaustible fund of facetiousness; occasionally bitterly sarcastic; but sometimes overflowing with harmless but irresistible raillery. He occupied a seat in the United States Senate in the winter of 1824-5, where I first saw him; was an ardent devotee of General Jackson, and both a hater and reviler of his illustrious antagonist, Mr. Clay.

The famous John G. Birney was also at the time mentioned a member of the Huntsville bar, where he was exceedingly beloved and respected. When he afterwards became the zealous advocate of African Emancipation, though his friends in Alabama could not then approve this part of his public career, he still retained much of their respect and kindness, and his integrity as a man was never called in question by them, nor were his learning and eloquence as a forensic advocate. Mr. Birney was a singularly fluent and polished speaker, and was known to have given much more attention to the niceties of orthoepy than was then customary among the lawyers of this newly-settled region.

John McKinley, I also now first met. Born, as I have heard him say, in the county of Culpepper, and state of Virginia, he had commenced his professional career in Kentucky, whence he migrated to Alabama, and soon gained a high rank at the bar of Huntsville. He was for some years in Congress, after my acquaintance with him was formed, and was appointed by General Jackson to a seat upon the Supreme Bench of the Union. He was undoubtedly a man of great morality and uprightness, and deficient neither in legal learning nor in ability in the argument of causes, both before courts and juries. There was much in his busy and varied career to reward the labors of some impartial and competent biographer.

Harvy T. Thornton was also a member of the Huntsville bar in 1825. Born also in Virginia, and reared in Kentucky, he came to Alabama about fifty-five years ago. He was the grandson of the celebrated Harvey Turner, of whom Mr. Wirt makes such glowing mention in his *Life of Patrick Henry*; had married, before he left Kentucky, the accomplished and



amiable sister of John J. Crittenden, who, I am glad to know, still lives, surrounded by all that can render life desirable, save the presence and society of her tenderly lamented husband. Harvey T. Thornton, after acquiring much reputation at the bar, in legislative halls, and upon the bench of the supreme court of his adopted state, was selected by President Fillmore, in 1850, as one of the three land commissioners sent to California. There he gained much additional honor, and is yet remembered by all who there enjoyed his society, with unmixed affection and reverence. His eloquence in conversation was such as I have seldom known equalled, and his fund of choice and classic anecdote seemed altogether inexhaustible. A truer, braver, and more magnanimous gentleman has never lived.

In Huntsville, too, at the time mentioned, I first met James McClung, a leading member of the Alabama bar for many years; a graceful and effective speaker, born to be loved by all mankind, and one of the noblest specimens of genuine Southern chivalry that I have ever known. He was brave almost to a fault, but possessed as warm and generous sensibilities as ever glowed in the heart of purest and most exalted manhood. Colonel McClung was born in east Tennessee, where many of his relations and early friends yet have him in respectful and tender remembrance. Some of the incidents of his stormy and eventful life would prove as attractive in narrative as the most thrilling scenes depicted by a Scott, a Bulwer or a Dickens.

I should not omit to state here that in Huntsville, at this time, I first encountered a gentleman of the rarest gifts and graces, and with whom I afterwards formed a close friendship in the state of Mississippi, where, for many years he practised law with great distinction, and where he was universally loved and respected. I allude to *Caswell R. Clifton*, whose whole life was marked with displays of domestic and social virtue, who held various public offices of much responsibility, and was universally admitted to have done honor to them all.

Many other loved and venerated names recur to "my palsied and softened memory," in looking back to the occa-

sion of my first visit to Huntsville, upon which, were it allowed me, I should gladly dilate. But I must hasten to conclude this article, which I fear will seem to some already too long, by some account of a scene of unusual interest which I will now briefly depicture.

General Andrew Jackson, and Colonel James Jackson, of Lauderdale county, in the state of Alabama, were at one time intimate friends. They were both men of eminent worth, of most elevated social standing, and of indomitable strength of will. They became bitter enemies, both political and personal. I have heard the causes of their lamentable estrangement recited, but do not care to specify them here. Colonel John Donelson, a nephew of the venerated wife of General Jackson, resided in north Alabama, not far from the residence of James Jackson. He was a very wealthy man. His personal integrity was unquestioned; his personal courage had well-nigh passed into a proverb. It so happened that a Mr. Smith, also a resident of this once famous vicinage, had married a niece of James Jackson. A bitter personal feud sprang up between Donelson and Smith which soon involved their numerous friends, and in the progress of which much crimination and recrimination was indulged. At last aspersive words of a highly insulting character were publicly used by Donelson, out of which originated an action for slander. Donelson, when sued, so far from denying the employment of the offensive words imputed to him, *justified* the utterance of them and prepared to make them good by proof. James Jackson was, perhaps, the wealthiest man at this time in the county where he lived. He was in the highest degree popular and influential. I had a familiar acquaintance with him, and esteemed him most highly. He was an Irish immigrant to this country, and had brought with him from his native land much money and a numerous and accomplished family connection. He had come across the ocean in the latter part of the last century because of the serious civil disturbances then prevailing there. It was soon ascertained that the whole population of Lauderdale had become so embroiled by this unhappy contest, that it would be impossible to try the case there, and a *change of*

*venue* was had. This proceeding brought the case and parties across the river to the county of Franklin, where I resided at the time. The circuit court was then held in the old village of Russellville, about eighteen miles from the Tennessee river. The judge who was to preside at the trial was a gentleman of great integrity and reputation, of undoubted learning, and was sternly resolved to do his duty as a public officer, under the trying circumstances which surrounded him. The day of trial came, and the contending litigants came also, attended by their numerous friends and adherents. The witnesses of Donelson were so numerous that, for want of tavern accommodation, they had to encamp in the fields adjoining the village. There was a grand array of attorneys on both sides, each of the parties contestant having employed four or five. Judge Kelley was the leading counsel for the defence, and was expected to make the concluding speech in support of the plea of *justification*. I had a good opportunity of seeing and hearing all that occurred, having been specially employed to *take down the evidence*, for which I gratefully remember to have received what I regarded at the time as quite a *remunerative* fee.

The trial occupied several days. The lawyers on both sides exerted themselves to the utmost, and exhibited ability and zeal which I have never seen surpassed. It had not then become fashionable to occupy seven or eight weeks in the trial of a single case, and the arts of procrastination, now so freely allowed in certain localities, for the spread of social excitement and the diffusion of forensic fame, would have been then nowhere tolerated. More than a hundred witnesses were examined; there was much conflicting evidence; many different and interesting points of law were discussed and decided, and the trial was brought to an end before the close of a week. The speech of Judge Hopkins was most masterly. I do not know that I have heard it since surpassed. He analyzed the testimony fully; he explained the legal principles involved with a power and earnestness which filled all present with admiration; his peroration was marked with the most soul-moving and overwhelming eloquence. The court having adjourned

for dinner immediately after Judge Hopkins had concluded, I met Judge Kelly at the door of the court-house as he was passing through it, and enquired of him what he thought of the effort he had just witnessed. He responded, with tears flowing down his cheeks: "I shall leave the state for New Orleans in a few days, but I leave no man behind me whose abilities I respect as much as I do those of Arthur F. Hopkins. *He is the biggest handful I ever grasped!*" After our return from dinner, Judge Kelly commenced his response. I doubt exceedingly whether a more telling and effective forensic speech has ever been made on either side of the Atlantic since the days of Erskine and Curran. He was logical, he was facetious, he was pathetic, he was denunciatory, by turns; and he seemed to wield the jury as a boy would do his playthings. The presidential contest between Jackson and Adams had just occurred, and the whole public mind of Alabama had been inflamed almost to madness by the fierce discussions of the period. The members of the jury were all *Jackson men*. Right well did Judge Kelly know this important fact, and right adroitly did he take advantage of it. He alluded more than once to the fact that Donelson was the nephew of the hero of New Orleans, and that his antagonist was the nephew, by marriage, of one of his bitterest foes. As he thundered forth his furious invective, the faces of the jury were ablaze with partizan excitement and indignation. They retired, under the charge of the court to the room assigned them for conference; but no conference there took place. Their minds were already made up. A loud "*hurrah for Jackson*" was heard as they left the court room, and a few minutes thereafter, they returned with a verdict for the defendant; which verdict the Judge, though himself an ardent Jackson man, set aside at once without waiting for a motion to be made for that purpose.

H. S. FOOTE.

## Foreign Selections.

### *I. THE CHARACTER OF COKE.*

It is said by Lord Campbell of Sir Edward Coke, in his *Lives of the Chief Justices*, that "from his odious defects, justice has hardly been done to his merits." The learned author himself expresses the object of his memoir to be "fairly to delineate his career and to estimate his character." We doubt whether Lord Campbell ever was or could be fair, though in this case he seems to have tried, but, to our thinking, not successfully. It is because we can not accept his estimate of the character of Coke, and because we conceive that his "merits" have been little dwelt upon, while his "defects" have been made out more "odious" than they were, that we write these few brief observations. Even Hallam, whose general fairness none can dispute, seems in this case to give us more of the dark than the bright side of Coke's character.

Sir Edward Coke was born on the 1st of February, 1551-2. He was the son of Robert Coke, who, though possessed of property, had practised at the bar and risen to be a Bencher. The Cokes were an old Norfolk family, and, as we shall see, were well known and respected in their native county. That he was taught, and as he gratefully said in after-life, well taught and trained, by his mother to the age of ten; that he went to Trinity College, Cambridge, in his sixteenth year, and left without taking a degree, is about all we know as to his early life, the rest being mostly conjecture. In respect of his caring little for classical honors, he is not unlike many eminent lawyers that have lived since his time; while he resembles them in the labor he bestowed upon the study of the law. To that study he nobly devoted his life, and in his old age we find him pursuing the same study with a still living energy as a prisoner in the Tower. From the brave way in which he mastered the laws of his country, and used his hard-earned

power in defence of her liberties, his biographers generally concur in calling him "narrow minded." They compare his dry labor with the brilliant genius of Bacon, and forget to consider which did most in defence of the constitution.

It may be well, in passing, to consider the course of study pursued by this the greatest of Common lawyers, if only to show how he acquired that power, afterwards so well employed, but perhaps also as an example to modern students. In accordance with the sound old system of those days, now unhappily fallen away, he was entered at Clifford's Inn, an inn of chancery, where he passed through a year's elementary and preparatory study, before proceeding to the Inn of Court. On the 24th April, 1572, we find young Coke admitted as a student to the Inner Temple, and here his work began in earnest. We may be pardoned for quoting from Campbell's Life this account of his plan of study, on account of its antiquity and its interest to students: "Every morning he rose at three, in the winter season, lighting his own fire. He read Bracton, Littleton, the Year Books, and the Folio Abridgments of the Law, till the courts met at eight. He then went by water to Westminster, and heard cases argued till twelve, when pleas ceased for dinner. After a short repast in the Inner Temple Hall, he attended readings and lectures in the afternoon, and then resumed his private studies till five, or supper-time. This meal being ended, the 'moots' took place, when difficult questions of law were proposed and discussed—if the weather was fine, in the garden by the river side; if it rained, in the covered walks near the Temple Church. Finally, he shut himself up in his chamber, and worked at his common-place book, in which he inserted under the proper heads all the legal information he had collected during the day. When nine o'clock struck he retired to bed, that he might have an equal portion of sleep before and after midnight." With something like a sneer, his literary lordship then goes on to say that young Coke did not "indulge in such unprofitable reading as the poems of Lord Surrey or Spencer," and never went to the play. But this may well have been because he thought the law a nobler study, and one more worthy of a man's ambition. And after all there

is, perhaps, some danger, in this age of literary smatterers, of our forgetting that the royal prerogative was never controlled by poetry, nor the privileges of the commons supported by the play.

After such work as this, it is no wonder that Coke soon grew in business at the bar. His success is put down by Campbell mainly to a "deep skill in the art of special pleading." His own reports would seem to show, also, a deep knowledge of the principles that support our laws, but of this we hear nothing from his "fair" biographer. At all events, he was very soon appointed Reader to Lyon's Inn, by the Benchers of the Inner Temple, and greatly increased his fame by the lectures there delivered. He shortly afterwards, by his arguments, established the celebrated rule in "Shelley's case," which has remained untouched to the present day. From that time Coke's rise was rapid; he made a fortune, and married an heiress with beauty, learning and high connections.

After being recorder of Coventry and Norwich, he was, in 1592, unanimously elected recorder of London, by the citizens, which is surely a great testimony to his merit and popularity. But it was on his being appointed solicitor-general, in May 1592, that the life of Coke becomes more interesting and important. Soon after this we have another proof of his popularity, for the freeholders of his native county, Norfolk, elected him as their member, that election being, as he states himself, "unanimous, free, spontaneous, without any solicitation or canvassing on my part." In considering the character of any other man but Coke, whose defects have, in course of time, grown in popular estimation more and more odious, such a fact would be spoken and written of as at least some proof of his honorable position in the eyes of those of his countrymen who knew him best; but in Campbell's Life it is merely mentioned.

No sooner was Coke elected than he was chosen by the commons as their speaker. This, again, would seem to show the high honor in which he was held by all men, and as such it should fairly be construed. As speaker, Coke had to make the usual oration of the time, full of forced metaphors and flowery

words. But in judging of this and other speeches of the same kind, it is only right that the custom of those days should also be considered. We know, by the plays and the poetry of the age of Elizabeth, what high-flown nonsense was written and spoken. But after all, what did it mean? Did it amount to much more than the traditionary language in which Orientals speak of their sovereigns as related to the sun, moon and stars? We conceive it to be both a harsh and a hasty judgment to take this flowery formula, that Coke used according to custom, and dub it court flattery employed by him for mean purposes and selfish ambition. We shall at least find, that when duty was involved, he could speak plainly enough to kings, and support freedom by blunt appeal to law; but Lord Campbell will not have it so. He quotes, at some length, a speech made by Coke, as speaker, on the dissolution of Parliament, which concludes by telling the Queen,—“Our lands, our goods, our lives are prostrate at your feet to be commanded;” and then asks: “Who would suppose that this was the same individual who framed and carried the Petition of Right?” We fail to see the point of the question. To our thinking, the one was a mere form of words appropriate to the time, and echoed even nowadays in such expressions as “gracious majesty,” while the other was the simple language of freedom. In the former, we have Mr. Speaker Coke, in court costume, using the traditional formula of his office; in the latter we hear plain Edward Coke speaking the words of a constitutional English lawyer.

In 1594 Coke was appointed attorney-general, and soon afterwards occurred those state trials, his conduct during which has cast the greatest slur upon his fame. But here, again, it is necessary to consider the manners of that time, the roughness of speech, and the way in which trials were conducted, before we can arrive at a fair conclusion. The offence of Essex is admitted to have been in point of law high treason, and Coke was in all things and above all things a lawyer. Moreover, the earl himself well described the manners of the attorney-general, when he said, “he playeth the orator, and abuses your lordships’ ears with slanders; but they are but fashions of or-



ators in corrupt states." To admit this much is no harm to Coke's memory. It may be noted also that the pity felt for this young man has heightened the feeling with which Coke's strong language may fairly be considered. At least it may be pleaded for him that they were but hard words—the fashion of a rough orator; and that here, as on many other occasions, he compares favorably with his brilliant rival Bacon, who went far beyond language and was guilty of acts of treachery towards one who had been his friend and benefactor.

Soon after the accession of James I., Coke was knighted, and on this occasion Lord Campbell well says of him: "To his credit it should be remembered that he at no time strove to gain the favor of the great, that he never mixed in court intrigues, and that he was content to recommend himself to promotion by what he considered to be the faithful discharge of his official duties." When we read, in Hallam, on the other hand, that he was "a flatterer and tool of the court till he had obtained his ends," it is not too much to say that the character of this great lawyer has at least been misunderstood.

It is mainly from his behavior at the trial of Sir Walter Raleigh that Coke's reputation has suffered. But even here there is surely something to be said in his favor. Again we plead the rough language of the time; again we say that pity for the victim has caused people to deal harsh justice towards one who was his prosecutor. But Coke was bound to do his duty in his place, and, putting aside ungenerous language, did he do much more? There seems no proof of any personal malice felt by the attorney-general towards Sir Walter Raleigh, and the expressions most objected to against him were used in answer to the prisoner's frequent interruptions. And what does Raleigh himself say of this language, which to modern ears sounds so malicious, overbearing and cruel? Simply this: "Your words can not condemn me; my innocence is my defence." It must also be remembered that Coke had no hand in the subsequent execution of Raleigh.

On the 30th June, 1606, Coke was made Chief Justice of the Common Pleas, and from this time, at least, his life stands out as a brilliant example of a true lawyer, an upright judge,

an enlightened patriot; even Lord Campbell admits, "the whole of his subsequent career is entitled to the highest admiration." We would go further, and say that his conduct is entitled to the undying gratitude of his countrymen. On his aptitude for the office on account of his vast learning it is unnecessary to dwell. Campbell calls him "the greatest oracle of our municipal jurisprudence;" Hallam, "the greatest master of law that had yet been seen." We hold him to have been, not only the greatest common lawyer that ever lived, but also the man who did most to settle the great principles of that law, and to lay upon firm foundations that customary rule of right which we maintain to have ever been the true guardian of English freedom.

It is, however, to the occasions on which Coke showed the width of his mind, as well as the depth of his learning, when he proved himself not only a common lawyer in the narrow sense, but also the larger meaning of that word, which includes our constitution, that we would draw particular attention. Soon after Coke was made Chief Justice, he opposed the Court of High Commission, through means of which there can be no doubt it was the intention of James I. to establish the royal prerogative in all its full-blown tyranny. This was to be done, as is well known, by ingeniously hiding a temporal jurisdiction under the mask of the spiritual; by bringing lay persons under the power of an ecclesiastical tribunal. But Coke, followed by the other judges, fearlessly issued prohibitions from his court to stop these illegal proceedings, and succeeded. The plan was then tried of making Coke himself a member of the Court of High Commission, but that failed also, as he refused to sit. But the most serious attempt to defeat constitutional liberty was that of Archbishop Bancroft, when that worthy prelate tried to support his theory that, because the judges administered justice in the King's name, the King could himself determine cases without the judges. The courtier Archbishop held that to be "clear divinity," but Coke, when summoned, showed what was clear law. In strong and simple words, the chief justice laid down the common law of England before James I., in his council at Whitehall, as calmly and

as fearlessly as if speaking from the Bench at Westminster. And when the infatuated monarch exclaimed, as report says, in a great rage, "Then am I to be under the law, which it is treason to affirm?" Coke replied, in the brief words of an old lawyer, "Thus wrote Bracton, 'Rex non debet esse sub homine, sed sub DEO ET LEGE.'"

If James had succeeded in this contention, where would have been the power and dignity of the judicial bench, and where one great safeguard of English liberty? And that he would, but for Coke, have succeeded, is likely, when we consider the cowardly conduct of all the other judges on another occasion. It was a clear instance of the great conflict between the common law of the land made by the people for the people, and the so-called law of divinity invented by courtiers for the use of kings. The common law was victorious, and has not since been seriously questioned. We say it is to the learning, large-mindedness and intrepidity of Coke, that this great triumph was owing, and to his great honor it should always be remembered by his countrymen.

The next great instance in which Coke showed his learning, intrepidity and patriotism, was on the question of the legality of proclamations. If the pretended power of James had not been summarily stopped, there would have been an end to the authority of Parliament as well as that of common law. The commons presented an address against the use and abuse of the royal prerogative, and on Bacon fell the duty of its presentation. With the literary ability that results in flowery nonsense did he perform his duty, but though he talked of the "mourning of a dove," the King was not quite so easily deceived. He therefore summoned the judges together, and asked whether the power of issuing these proclamations did not belong to him. The judges in agreement with, and probably in obedience to, Coke, answered him that "The law of England is divided into three parts: Common law, statute law, and custom; but the King's proclamation is none of them." Also, "That the King hath no prerogative but that which the law of the land allows him." Here again we find the great common lawyer supporting the

liberties of his country against the tyrannical ingenuity of the Stuart courtiers and ecclesiastics. And here again he compares favorably with the brilliant Bacon, and in the eyes of Englishmen, at least, should be placed on a higher pinnacle if they value their great liberties, than he who by his wondrous genius achieved a world wide reputation.

In 1613, Coke was, against his consent, removed to the King's Bench, as Lord Campbell says, "under a hint that he might be turned off entirely." And here we may mention a fact that seems to have been little noticed. The fearless intrepidity and courage of Coke was not protected, as would be that of our judges nowadays, who can not be removed without an impeachment from both houses of Parliament. He therefore stood to lose his place at the mercy of the court, and, as we know, he did so lose it. Surely, then, it is but fair to give him greater honor when, in opposing that corrupt court for the benefit of his countrymen, he risked all he had earned by years of labor and hard study.

And in this view it is important to consider the question of benevolences. We have it from his great rival, Bacon, that the ground Coke took was that "a benevolence was a free-will offering, not a tax." This, also, was clearly laying down the law without any regard to the thoughts or feelings of the court, which could at any moment remove him from office; for if it was not a tax, any attempt to enforce payment was clearly illegal.

In the case of Overbury, Coke again won the unwilling admiration of Bacon for the way in which he investigated the matter, and brought the guilty parties, though high in court favor, to their proper punishment. In Coke's dispute with Lord Ellesmere as to injunctions from the Court of Chancery, we have another important matter, which has generally been considered in a very one-sided way. It was really a war between common law and equity, and because the latter has succeeded, many writers say that Coke was wrong; but in doing so, they compare the Court of Chancery as it is now with what it was in the time of James I. There is no doubt that this tribunal is at present a most important part of the administration of

justice. It is peculiarly suited to the present complicated state of civilization. But that does not prove that Coke was wrong in his opposition to the encroachments of chancery. If we put aside the consideration of the Court of Equity as it is now, and consider what it was then, and still more what, but for Coke's opposition, it might have become, we shall take a fairer view of the situation.

The common law was the law of England, and as such endeared to the people. It was administered by judges with whose decision the court could not in any way interfere. The chancery law was formed, at least in its origin, not so much upon the grand code of civil law perfected in ancient Rome, as upon a bastard and ecclesiastical imitation. It was moreover administered by courtier lord chancellors, who, as the favorites of the King, did all they could to turn its rules and maxims in support of divine right and the royal prerogative. Taking, as Coke did, this view of the matter, he acted not only as a common, but as a sound constitutional lawyer in resisting every attempt by which equity sought for pre-eminence. Of course, now that the chancery courts are administered in much the same way as those of Westminster, it is easy to say he was mistaken; but any one who knows the dispositions and temptations of the early chancellors, will praise instead of blame his opposition. The danger of giving way to the court of chancery in all its demands could not be more clearly proved than by the fact that on the matter of Coke's protest being brought before the King, he decided with a high hand in favor of the chancellor. This shows, then, most plainly that had the Courts of Chancery of that day had their will, they would have supported and been supported by the royal prerogative. But with the common law it was ever the reverse, and this is the glory of Coke as the greatest of common lawyers.

Soon after this, there arose another case, the "case of *Comendams*," in which Coke's conduct was of even greater importance to posterity, for in it he again vindicated that independence of the judicial bench without which no country could ever pretend to freedom. This was a case also in which the liberty of the bar was equally, though indirectly interfered

with, and threatened; for the King, and Bacon with him, tried to maintain the position that the judges could not hear any argument in which his prerogative was concerned. Had this view of the law been admitted, the consequences must have been serious. But Coke knew the duties of his position too well, and, with the consent of the other judges, he sent an answer to the King, in which he laid it down, referring to the letter of Bacon, as attorney-general, complaining of the matter, and commanding the court to hear no more of the argument, "That in case any letter come to us contrary to law, we do nothing therefore, but certify your Majesty thereof, and go forth to do the law, notwithstanding the same."

Upon receiving this answer, the King, "in a fury," as we are told, summoned all the judges to Whitehall. In his usual violent and tyrannical language, he addressed them, and all except Coke cowardly gave way to the royal anger, and sued for pardon. Here we find out the strength of Coke's character, and have a clear proof that it was his courageous bearing and intrepid resolution that had so long kept them together. He did not give way, but stood up like a man and a lawyer, for the rights of his fellows and the privileges of his office. He stated that "obedience to his Majesty's command would have been a delay of justice contrary to law and contrary to the oaths of the judges." Then Lord Ellesmere and, we grieve to say it, Bacon himself, began to argue in fact that the law could not touch the royal prerogative. But all that Coke could be got to say in further answer was the dignified reply, worthy of Raleigh himself, that "it would not become me further to argue with your Majesty." Yet that was not the end, for Coke had still to utter those words that are worthy of the greatest among Englishmen.

We will here quote from Lord Campbell, who thus writes: "In the belief that Coke was humbled as effectually well as the other judges, the following question was put to them: 'In a case where the King believes his prerogative or interest concerned, and requires the judges to attend him for their advice, ought they not to stay proceedings till his Majesty has consulted them?' *All the judges except Coke: 'Yes! yes!! yes!!!'*

COKE: 'WHEN THE CASE HAPPENS, I SHALL DO THAT WHICH SHALL BE FIT FOR A JUDGE TO DO.'" This "simple and sublime answer" abashed everybody, including the cowardly judges. But notwithstanding this, Coke might have kept his place, had he condescended to approve of a job for the benefit of the King's favorite. This was the disposal of a sinecure office worth £4,000 a year as chief clerk to the court of King's Bench. But notwithstanding the influence of Bacon, who, regardless of his philosophy, seems to have been foremost in every job of his time, Coke would not give way to court intrigue. Here once more he held by the true traditions of his office, and claimed his undoubted right to dispose of the place for the benefit of the judges.

It was mainly on this ground, though such was not the admitted cause, that he was summoned before the Privy Council. The reasons then given were as frivolous as they were illegal; but on those grounds he was suspended from his office. Later on, and without any more evidence against him, he was most tyrannically removed from the bench on which he had presided with so much honor, dignity and power. It is said that he received this unjust sentence with dejection and tears. But we conceive that these tears were more honorable to Coke than "composure," the want of which Lord Campbell laments. For he may well have been sorrowful at such a stretch of power as removed him from his position of authority. He may well have been grieved, and generations of Englishmen can join with him, at that arbitrary authority which took away from him the right to do good to his countrymen, and uphold their liberties with the common law. Those tears were, to our thinking, no disgrace, but rather an honor, to his strong mind and undaunted courage. They were not shed by him as a mere narrow-minded common lawyer, but as a man having the knowledge and the ability to vindicate the freedom of our great constitution.

Like truly noble minds, Coke did not despair after what is called his "disgrace." He was a man who had lived temperately and worked hard, so that even in what may said to be his old age, he was full of energy both of body and mind.

We pass over the incident as to his daughter, conceiving that it has nothing to do with his character as a common and constitutional lawyer, as to which only are we now concerned. On this point it is only needful to remark that the custom of the time was different from that of nowadays, and that even in this matter his character will bear a favorable comparison with that of the intriguing Bacon.

In 1620, Coke was returned to the house of commons as member for Liskeard, and in the course of his duty he exposed the abuse of monopolies. Thus do we find the ex-chief justice sticking to his post, the common law, and opposing everything that is against its true spirit of liberty. Here, again, the King's prerogative came into question, and Coke was as fearless as before in his answer. He said: "The King hath indisputable prerogative, as to make war; but there are things indisputably beyond his prerogative, as to grant monopolies."

Shortly afterwards Coke, as a member of the house of commons, defended the freedom of Parliament. The King claimed the right of ordering the two houses to adjourn: Coke admitted the royal power to prorogue or dissolve Parliament, but not to adjourn their debate. An adjournment, he held, could only be by the spontaneous vote of each house. But the King, holding by that prerogative which subsequently sent his son to the scaffold, determined that the adjournment should be made. The house of lords gave way, but the commons, led by Coke, refused. Still an obsequious majority at last voted for an adjournment according to the King's pleasure. On this we read in the report of the Proceedings and Debates, that "Sir Edward Coke, with tears in his eyes, standing up, recited the Collect for the King and his issue, adding only to it, 'and defend them from their enemies.'" After this the house adjourned.

Were these later words prophetic of what Coke saw would happen in the future? Did not this large-minded man, looking back upon the past, and knowing the foundations of his country's freedom, feel, as many other great men have felt be-



fore and after him, that a time had nearly come when the people would stand no more nonsense about royal prerogative and divine right? And will any one blame his tears? Surely they were tears of manliness shed in sorrow at the sight of a free Parliament giving up its freedom at the command of a King. And such a King—a man who has been the laughing-stock of the world—a man more suited to be a village school-master than the occupant of the highest throne in Europe. And yet Coke is styled, even by Hallam, as “a man of strong, though *narrow* intellect!” The mind that could oppose the encroachments of the Stuarts, and weep over the weakness of his countrymen, is, to our thinking, most unfairly called “narrow.” It would be difficult to find in all history a better example of a large-minded, far-seeing, patriotic Englishman than Sir Edward Coke.

If what has been written is not enough to make the memory of Coke ever fresh in the hearts of his countrymen, there are other matters, which, being more easily appreciated by the present generation, may have this effect. In a time when monopolies were supported by the majority, he was a free-trader; basing his principles upon what we deem to be the foundation of England's greatness, her old common law, he held that “freedom of trade is the life of trade; and all monopolies and restrictions of trade do overthrow trade.” In another matter also do we find this grand old lawyer in harmony with ideas that have become facts after the lapse of three centuries; for he made a speech in favor of the abolition of the Corn Laws worthy of Cobden himself, in which he said, “If we bar the importation of corn when it aboundeth, we shall not have it imported when we lack it.”

Gradually advancing to his greatest achievement, we find Coke moving a protestation in favor of the privileges of the house of commons. This protestation was drawn by him, and, through his influence, was entered upon the journals of the house. It is a noble, manly, and lawyer-like statement of the rights, without which the house of commons would cease to have any real power. James tore it with his own hands from the book, and contemptuously threw away the pieces;

but it has remained, nevertheless, written in the minds of men as a monument to liberty.

For this service to his country, Coke was, as other men had been for similar services, imprisoned in the Tower. But even then he did not despair. He employed his great mind in legal study, and went on with his commentary upon *Lyttelton*. Some writers seem to consider this as merely following the bent of his genius towards the dry details of legal matters. We venture to say that it showed the great mind of the man who, notwithstanding all obstacles, was determined to do his best towards placing the laws of his country upon a firm foundation, and it is difficult to imagine a grander ambition than that which seeks to lay down for posterity those rules upon which justice should be administered and freedom founded.

Without following Coke through all the incidents of his later life, for which we have not space in this short article, let us consider his conduct as member of the house of commons in the reign of Charles I. His moderation on the accession of that monarch is admitted. Still, the tyrannical court were so afraid of his patriotism and learning that they made him sheriff of Buckinghamshire, to disqualify him for the house of commons. He was then in his seventy-fifth year; but though he accepted the office most unwillingly, he performed its duties in the same proper spirit as he had performed all others. This ingenious device was not carried out in the next Parliament, and Coke was returned for Suffolk and Buckinghamshire; he chose the latter as being the county in which he had long lived, and where, to use the words of Campbell, "he was now regarded with veneration almost amounting to idolatry."

The greatest monument to the memory of Coke is the *Petition of Right*, which he framed and carried in his old age by means of that energy and love for freedom that never left him. This service is not likely to be forgotten by his own countrymen, and therefore need not long be dwelt upon. But it was a splendid achievement for any man, and more so for one who had attained that age when rest is supposed to have been fairly earned after such a life of labor. It is enough to say that Coke drew and passed a second *Magna Charta*, and that the

old common lawyer crowned a career of hard work with what is a landmark in our constitutional history.

The way in which Coke carried the Petition of Right forms one of the grandest passages in history, and one of which lawyers, at least, should be most proud. To the King's evasive answer and general words, he answered with the dignity befitting one who took his stand on the old lines of our constitution. "The King's answer is very gracious, but we have to look to the law of the realm," he plainly told the wavering commons. And he said further: "Lut us put up a petition of right, not that I distrust the King, but I can not take his trust save in a parliamentary way." These were the words of a true patriot, and in such a spirit Coke carried the second charta of our liberties, as is recorded in every history.

It is needless to follow this life any farther; what remained of it was spent by the lawyer in the eager study of the law, and in perfecting those monuments of learning which he has left to posterity.

It is difficult to sum up the character of Coke in a few neat sentences; it is impossible to weigh the life and work of such a man in the mean balance of a few phrases. That life and that work speak best for themselves. The nobleness of his deeds should far outbalance the rudeness of his words. His lofty independence as a judge is an ample set-off to his overbearing conduct as attorney-general. The good he did in maintaining the freedom of our constitution makes amends for all his faults of speech and manner. He was admittedly the greatest of common lawyers, and the most intrepid of English judges. He stood forth as a man of iron will and gigantic intellect at a period of our history when both were sorely wanting. It is not too much to say that by his labor in the law he did more for the real cause of right than many Parliaments. Without those works, to the perfection and completion of which he devoted his whole life, there would have been wanting the firmest of the foundations on which to this day justice is administered. And for his support of constitutional liberty Coke should receive the undying gratitude and veneration, not only of all lawyers but of all Englishmen.—*The Law.*

## II. A FRENCH SCHOOL OF LAW IN JAPAN.

The October number of the "*Revue de Legislation Ancienne et Moderne*" (1874), contains some information concerning the infusion into the newly opened Eastern land of the principles of western law, which can hardly fail to be of interest to us in England, among whom Japanese students have already come honorably to the front.

Few circumstances could be more worthy of our attention, or more indicative of the strides that the land of the Mikado has been taking within the last few years in the direction of western culture, than this opening of a school of law in Yeddo, by a French professor, lecturing to Japanese students in his own tongue, and quoting for their instruction some of the most celebrated definitions of Ulpian, and other great Roman jurists. "*Honeste vivere, neminem eddere, justum cinque tribuere,*" maxims which were read or spoken to many a class among the students of the Roman bar, have gone eastwards to meet the sun, and form a generation of practitioners in a world to which the Roman eagle never penetrated.

M. Boissonade, one of the editors of the "*Revue de Legislation*," and an "*Agrege*" of the Paris Law Faculty, was selected by the French government, together with M. Bousquet, to proceed to Japan and carry out the wishes of the Mikado's government for the establishment of a native school of jurists, trained on western principles, who should in time become the judges and magistrates and the barristers of New Japan. Before the pupils of these Paris professors the Old Japan of the Daunios and Ronius must needs rapidly fade away; and the establishment of the school on a firm basis can not but be accounted one of the most important steps taken in the direction of sound progress. For hitherto, as M. Boissonade points out, the administration of justice in Japan had rested upon the uncertain footing of unwritten traditions and customs, and local practices, and sometimes

natural equity, as interpreted by the governors of the various provinces. Whether these magistrates of the empire decided on the whole well or ill, it is evident that the system was far too arbitrary to last the moment the nation came into contact with western civilization. Everything must now undergo change; the civil law must provide an ownership of land that shall no longer be, as of old, revocable and precarious; the criminal law must provide the magistrate with a uniform rule and a precise text, promulgated by lawful authority, and enforced by the sanctions of the state; and education must help to diminish crime by raising the moral tone of the people.

The subject which M. Boissonade chose for his inaugural lecture was Natural Law, the only portion of the field of jurisprudence, as he considered, fitted for the study of his pupils at a time of transition, when the old law is disappearing, and the new law is not yet formulated. This natural law, in his view, is to lead up to positive law, which ought to be its clearest possible expression, its most indisputable formula. "When the law promulgated by men," said St. Thomas Aquinas, "deviates from natural law, it is no longer law, but the corruption of law." The legislator's task, then, according to M. Boissonade, is to make the law natural, clear and determinate; and it is a task which is nowhere concluded, and can never be concluded, amid the constant changes and developments of nations, and of the moral and intellectual as well as of the material world—changes of which the very scene of M. Boissonade's prelection affords a striking evidence. This natural law, however, is not in the French professor's eyes that of the so-called state of nature of eighteenth century philosophers, but that of man living in a social state—the only state which we know, and the only one which has need of a law, *i. e.*, a rule of conduct laid down by a superior (*imperativement tracee*), and also the only one in which the fulfilment of duties can be demanded.

It is difficult, as M. Boissonade admits, to draw the line in many cases between natural law and morality. The circle of morals doubtless comprehends that of natural law, and extends beyond it; but who shall say at what point we have left

the one and entered upon the other? Perhaps we may approach most nearly, he thinks, to a solution of the problem if we say that natural law is limited to the precepts of justice, which tend directly to the preservation and development of the social state, while the precepts of morality tend in addition to the preservation and development of the individual in a state of well-being. But even under this definition it is admitted by its author that there remains the difficulty of knowing whether a given precept affects the social state, and it is so hard to conceive of a precept that should tend to better the individual without also affecting society at large, that one is induced to extend the sphere of law indefinitely.

From the natural law thus understood, which is anterior to positive law, flows both public and private law, and also in M. Boissonade's view, political economy, which is the body of natural laws that regulate the production and increase of the wealth of nations, but which, curiously enough, is not yet allowed by the Japanese government to form part of his course.

Following Montesquieu, who said: "I have strong support for my maxims when I have the Romans on my side." M. Boissonade embodies in his introductory sketch of natural law some of the maxims and definitions of what is still, as he justly observes, the fairest and richest jurisprudence that can be studied. After rejecting the definitions of Bossuet, Montesquieu, Portalis and Mirabeau, as wanting in precision, we are brought back to the "*Ors boni et æqui, justi et que injusti scientia*" of Ulpian, the stoic philosopher. But this famous utterance demands no less severe a criticism than some of the others which have already been put aside. For what, asks the French professor, is "*bonum*," and what is "*justum*?" Then, again, in the other proposition which we quoted at the outset of this article, "*Honeste vivere, neminem lædere, jus suum cuique tribuere*," there is a confusion of law with morality, and the spheres of the two are not distinguished. Strictly speaking, as M. Boissonade observes, these are moral precepts developed and applied by positive law. But they prescribe some of the most salient duties of the social state, the respect of the right of ownership, the prohibition of rapine, the duty

of repairing injuries done to a neighbor, and thus may be said to embrace civil, criminal and commercial law within their scope ; so full of meaning are those few words of the Roman jurist. They include all our social duties, says M. Boissonade, not excepting our duties to the state or organized society, which call upon us to defend our country with our life's blood, and to contribute towards the public expenses out of our private means ; for, manifestly, we should hurt our neighbors if we allowed the burden of supporting the social organizations, without which the individual would perish, to fall upon them. They include also the duties imposed upon us with penal sanctions, because although penal law does not lay down explicitly that we must not hurt our neighbor in his person, his honor, or his property, it nevertheless attaches external penalties to the violation of the precept, "*neminem lædere.*"

In the Japanese tongue this primordial precept of the natural law runs thus: "*Hito-o gai-sourou na.*" This it is which the legislator has to vivify and develop, and hence its fitness for being so strenuously urged at the opening of a school intended to be the nursery of the forensic and legislative intelligence of Japan. Hence also its fitness to interest us in M. Boissonade's work; of which we can not take a more suitable leave than in his own closing words—"As moral law may push its consequences and deductions much further than human law, if we observe all that our conscience and reason reveal to us, we shall at the same time satisfy both human and moral law.—*The Law Magazine and Review.*

### *III. THE PLACE OF ROMAN LAW IN LEGAL EDUCATION.\**

It is natural, and even necessary, for those beginning a new subject of study, to inquire what they may expect to gain from it. It is necessary to know what objects are to be kept in view, if these objects are to be accomplished with certainty. Now there are certain studies that carry their purpose and justification, so to speak, on their face. It requires no argument to show that a dentist should have some knowledge of the anatomy of the teeth, that a chemist should learn the reactions of the substances he has to compound, that a surgeon should study anatomy, or a physician physiology and pathology. In like manner, no one doubts that a conveyancer must know the law of property, and that an advocate should be familiar with the departments of law in which he practices.

So far everything is clear. An English lawyer should know English law. But is it necessary that an English lawyer should know Roman law—the law of an empire that has been dead for a thousand years? This question is the more pertinent because the relation of English law to Roman law is, at least on the surface, very different from the relation of Scotch, French, or German law to Roman law. When Napoleon began his work of codification, his object was as much to establish a uniform system of law throughout France, as to arrange, purify, and systematise the law. His codifiers had to make one system out of two; for in certain parts of the country customary law prevailed, and in others the Roman law. As might have been expected, the Roman law asserted itself as the backbone of his code. In England, the Roman law, as such, has nowhere established a supremacy.

In so far as it has affected the English law it has done so

\* The Introductory Lecture to the Class of Roman Law, University of College, London, October, 1874.



imperceptibly ; its doctrines having been quietly absorbed by the judges, with little reference to the source whence they were obtained. Moreover, the remarkable victory of feudalism in this country, placed a large part of the law at variance with the Roman jurisconsults ; and, by a historic accident, the contest of English laymen for supremacy over the ecclesiastics, led to a violent and ill-founded hatred of the very name of Roman law. The result is that during the last two hundred years, the common law has appeared to advance in a path of its own, owing nothing to Rome, but everything to the genius of the soil. At one time the Roman law was cultivated with great zeal and success ; but since the great ecclesiastical quarrel of the sixteenth century, it has been kept in the background, and only within the last few years has it again begun to flourish in this country.

Quite manifestly, therefore, the Roman law cannot rank in importance with common law, as a subject of study for an English student. A man may be an English lawyer without knowing Roman law, or the law of any country but his own. This fact, however, does not dispose of the claims of Roman law to our attention. In all professions, and indeed in many of the higher mechanical trades, it is not considered enough to know by rule of thumb what directly bears on practice. The recent demand for technical education among artisans attests a growing conviction that in order to learn even a handicraft, it is advisable to know something of the scientific principles upon which the art is based. Thus the necessity of a preliminary training in botany, zoology, and the like subjects is recognized in the teaching of medical students, although a man might make a very fair practitioner without knowing anything of those subjects. If Roman law, then, is, a proper or necessary subject of study for barristers or solicitors, it must take rank as a part of their preliminary education ; and, as such, must be admitted to have a more direct, practical bearing on their future work than the studies that form the staple of teaching in the universities. The question, thus, comes to be, is the place of Roman law to be found among the scientific branches of a lawyer's education ?

Perhaps the word "scientific" had better not be used, as it may mislead, but what I mean by scientific knowledge of law is a knowledge of the uses or purposes and value of the rules of law as distinguished from a mere acquaintance with the rules as rules. Rules of law exist for certain ends; one who knows the ends to be kept in view as well as the rules by which it is hoped to attain them, is a better lawyer than the man who, ignoring the purposes of law, is in continual danger of sacrificing the spirit to the letter, and of creating an artificial and technical hardness repugnant to the good sense of the community. Still more important to the lawyer, the rules of law are limited or qualified by the ends for which they are intended. Few, if any, rules of law are absolute and universal, and even when stated in the most general terms, law is subject to numerous tacit exceptions. Moreover, when there is the slightest ambiguity, law has to be interpreted with reference to its ends or purposes. Hence, in the wide subject of interpretation, one cannot advance a single step, surely, without a firm grasp of the purposes and methods of legislation. The processes with which a lawyer is concerned are either interpretation, or induction, or both; and to these processes a mere mechanical memory for cases is not enough. A naked memory for cases is all very well, so long as there are no inconsistent cases, and there are cases on all fours with the point in litigation; but when a point is really unsettled, a pleader must exercise the talent of analysis as well as of memory.

For the purpose of training a man to the uses and processes of law, nothing is to be compared to Roman law. In the first place, it has the advantage of expressing, so to speak, the ideas of English law in a different language, and the difference between Roman law in its latest phase, and the English law of the present day, is not great, but in form and style the difference is very great. The necessity is recognized on all hands of learning a foreign language, similar to ours, if we are to understand our own. The facile and ingenious Greeks fell into serious and obvious blunders, from the circumstance that they knew no language but their own. In like manner it may be said that a lawyer never really understands the law of his

own country until he has learned some other and different system. No doubt great sagacity and patient study of even one system will go far to render unnecessary a recourse to foreign systems ; but, having at hand such a body of law as was collected for us by Justinian, we should be throwing our advantage away if we did not avail ourselves of it as a means of education.

It is instructive to observe the English and Roman law, when they seek the same objects by like means ; but it is even more instructive to observe how they adapt themselves to the wants of two distinct civilizations. We are thus taught in a manner never to be forgotten, that law plays, although an important, still a subordinate part in the structure of civilized society. We learn that great as is its influence on the moral feelings and institutions of a people, it is the handmaid, and not the mistress of the sciences of morals and legislation. As one example, we may refer to the law relating to parent and child, husband and wife. These two relations are more important in their direct relation to the happiness of individuals, as well as the permanence of society, than any others known to law. In the Roman law everything depends on the relation of parent and child ; the relation of husband and wife had scarcely any legal position, except as affecting the primary relation of parent, or rather father and children. In the English law, on the contrary, there is no legal tie between parent and child, except indirectly through the Poor Law, and, when the child is a helpless infant, through the criminal law. There is no common law obligation to make a suitable provision for one's children, but a husband is bound to maintain his wife. On the contrary, in the Roman law, so far as I can make out, there was no legal obligation imposed on a husband to maintain his wife. The most significant circumstance of all, is that in the ancient Roman law, as it may be found in the earlier period of the Republic, there was a closer legal tie between husband and wife, described to us by Gaius by the word "*manus*," and by this *manus* a wife acquired a decided legal relation to her husband, but in what capacity ? as wife ? no, but as daughter. She was in law reckoned as one of her

husband's children ; and as a child, took her share of his property on his death. But before the close of the Republic the *manus* had fallen into disuse, and the legal tie between husband and wife was about the loosest the world has ever seen. From the strictness of the tie between parent and child, and the laxity of the tie between husband and wife, arose a law of marriage settlement very different in its origin and objects from an English marriage settlement. An English settlement always looks beyond the wife, and in general gives her only a life interest ; it is equally a provision for the children of the marriage. But a Roman marriage settlement was a provision for the wife alone, and not for her children after her. The main object of a marriage settlement in England is to provide for the death or bankruptcy of the husband, and so generally becomes of most use when the marriage is at an end. A Roman marriage settlement lasted only during the marriage, and was ended by the dissolution of the marriage. The theory of the English marriage settlement is to provide for the wife and children, when the husband is no longer able to provide for them ; the theory of the Roman marriage settlement was that it was to enable the husband to bear the expenses of supporting another man's daughter. For so strict was the tie between parent and child, that a father was bound to keep his daughter after marriage as much as before. Hence a very singular example of law is found in the Digest. The question arises, who is bound to pay for a wife's funeral ? The answer is that it is, in the first instance, her husband, out of the moneys provided for her on her marriage ; if no such moneys, then her father is compelled to pay the charges ; and if he is too poor, the burden is thrown in the last resort on the husband.

How it comes to pass that the English and Roman law should be so profoundly different in their attitude towards the elementary relations of social life, is a question that can not be answered with brevity, but the importance of its bearing on the study of law is manifest. Doubtless the best justification of our system is, that, as experience proves, there is no necessity for any stringent legal tie between parent and child ;

parents and children will discharge their reciprocal duties without the interference of law. That is the general rule, which has, however, its limits. Again it may be said, that if the relation of husband and wife is on a sound footing, the relation of parent and child will naturally be so, too. Still we have the strange spectacle that the tie between parent and child is very slight in English law, while it is very stringent in Roman law. So, the relation of husband and wife is very loose in the Roman law, and very stringent in the English law. This raises the question whether the Roman wives suffered from the laxity of the law, or the English wives benefit by the stringency of the law ; whether the Roman children were any the better for the strong tie binding them to their father ; or English children suffer from parental irresponsibility. At this point, however, as students of law, we stop. We have carried our enquiry to the threshold of the science of legislation, and there we must leave it.

It may be said, what is the use of knowing the Roman law of marriage settlement when it is based upon a state of social feeling, the very opposite of that which prevails in England ? And no doubt, for many reasons, the portions of Roman law that more closely resemble our own, are to be preferred for minute study ; but these subjects have a great interest, not merely from an historical point of view, but from a more practical one. It shows the flexibility with which law must adapt itself to the ever varying conditions of life. According as social demands change, so must law change too. The adjustment of these two things is the work of the legislator, and it is well for us to study that work in examples far away from the circle of our personal interests and prejudice, with impartial indifference.

I may advert, for a moment, to another subject that has a great historical interest, but is also full of instruction to one whose study is the operation of law. I mean slavery. This is the subject, beyond all others, that divides the Roman from the English law. It is the boast of England that no slave can breathe on English soil, that the soil or the ship covered by the English flag is an enfranchisement. The pursuit and capture of slaves is viewed by English statesmen as a crime akin

to piracy.. By what a gulf are we separated from the Romans! The capture and enslavement of prisoners of war was the proudest and most lucrative business of the Roman. The "domestic institution," as it has been euphemistically termed, although it is an institution that suppresses the most sacred domestic ties for the great bulk of the population, the domestic institution was, in later times at any rate, an essential factor in the government of Rome. Not merely the rough manual labor of the country, or skilled work of artisans, but the management of trading vessels and the conduct of extensive business was entrusted to slaves. A great, perhaps much the greatest, part of the agriculture, manufactures and commerce of Rome, was entirely conducted by slaves. Slavery thus confronted the lawyer at every step. Scarcely a question of law arose in which at some point or other the value of acts done by slaves had not to be determined; and thus the law of slavery must be sought for in every department and ramification of Roman law. No one can understand Roman law without thoroughly mastering the legal relation that subsisted between master and slave.

But if slavery be obsolete, what is the use of all this to an English student of law? It must be admitted that the subject is very remote from the requirements of an English student; indeed, from that point of view, it may be described as the most useless part of Roman law. Along with this admission I may be permitted to say that to the student of history, and of the history of law, the subject can not be overlooked. It is most interesting to observe how the institution of slavery worked throughout every phase of social life. No one can understand the organization of the ancient world who has not mastered the leading outlines of that now happily obsolete, but once extensive, department of law. I think it may be summed up in this lesson, that as much should be given to the slave as was consistent with the fundamental character of the institution. The law in Rome became one of growing humanity to slaves.

But, although the law of slavery is mainly of historical interest and value, and, indeed, much of it is of purely anti-

quarian interest, nevertheless it is not one that can be neglected even by those who do not wish to add to their legal accomplishments a knowledge of the history of law. Apart from its essential connections with so much of the Roman law, it illustrates many principles that are found largely in our own law. For example, slaves were the only persons who could be agents for making contracts, using the word agent in its strict sense. Thus, so far as the Romans developed a law of agency, it is to be found within the relation of master and slave.

If we had time to examine the corresponding parts of English law, we should strike upon some singular coincidences. Of course the persons who, in England, correspond to the Roman slaves, consist chiefly of those usually called the working classes. It is a curious circumstance that the English law exhibits a progress resembling that of Roman law. The difference is that the English law started from a point slightly in advance of the utmost liberality of the Roman law. In the time of Justinian, alongside the great class of slaves, properly so-called, were to be found *coloni*, or serfs. At the opening of English history, we also find a class of serfs, or villeins, but no slaves, in the old sense of the word. But the workmen in England, who were not serfs, were they free laborers? Far from it. A perusal of the statute of laborers (Edw. I.), and of the many similar statutes to be found about the same period, show that the laborer was not free, and that he groaned under a bondage, differing in name more than in substance, from slavery. In the first place it was a crime for a workman to ask or receive higher wages than it pleased the justices of the peace to allow. Thus so far from having a right to sell his labor at its highest value, a laborer who dared to attempt such a thing was punished by imprisonment. In the next place, a workman could not remove from his place of abode except under such restrictions as to make it practically impossible. The right of free locomotion was denied him. In the next place, in many instances he was not allowed to choose his own employment, but was compelled to work as an agricultural laborer. Finally, any attempt of laborers to

combine together to improve their position was summarily dealt with by the criminal law. Although it is a chapter of the history of English law, lying somewhat out of the beaten track, and not much known, it is not devoid of interest to those who at the present day begin to read the law of master and servant. Whoever reads the series of statutes to which I have referred, will have no difficulty in understanding the strange characteristics of some parts of that law. When Sir H. Maine says that the progress of society was from stratus to contract, we may state more specifically the steps of this progress. The Roman law began in a hard law of complete personal slavery; it ended by greatly alleviating the position of the slave, and especially of raising him to the standing of a colon or serf. The English law began with serfs, and persons in a position resembling serfs, and it has slowly moved on, till now in practice the old relation of master and slave is replaced by that of employer and workmen, or terms regulated by united agreement; and in law there remain but the dregs of the old legislation which still keep the law somewhat behind the age.

2. The second benefit from the study of Roman law is one that belongs, perhaps, rather to the accomplishments, than the equipment of a lawyer. It is the study of the Roman law as a growth, as a development, as a progressive system adapting itself from generation to generation to the new wants of the time. Here we find a most instructive comparison with the growth of English law, just as there is, I venture to think, a remarkable resemblance between the English and the Roman intellect. The Roman law, however, has an independent value of its own. It reveals a great chapter in the progress of civilization. It is a great chapter, but not the first. No mistake could be greater than to suppose that even the most archaic fragments of Roman law represents the legal ideas of primitive man. On the contrary, it was, in some respects, far in advance of the law of those northern conquerors who extinguished Rome itself. We do not find in the remotest period trial by battle, nor trial by ordeal. The laws of the XII. Tables, so far as we possess their fragments, give us the first light on the



early law of Rome. But the law of the XII. Tables is the law of a civilized people, and not only of a civilized people, but of a people over whom the state or the city has established its supremacy. The earliest chapter of Roman law discloses to us the subjugation of the patriarchal family, the triumphant victory of the central authority, and all that remains is but to follow out the victory to its logical conclusions. But Rome gradually advanced from the position of a city to be the capital, first of Italy, and then of nearly the whole world. The problem that its jurists and legislators patiently, slowly, but steadily and successfully accomplished, was to work upwards from a narrow system, suited only to tripod government, and to very small communities, to a body of rules under which it is scarcely an exaggeration to say the whole human race could live, if that federation of the world, of which the poet sings, were to be an accomplished fact. They created a criminal law, they transformed the legal relations of husband and wife, parent and child, they so altered their law of property that the first jurists would not have recognized it, they developed a vast law of legacy, they developed a law of contracts out of very rude and scanty material, and they twice reorganized their civil procedure. Comparing the beginning with the end there is a wide contrast, but from beginning to end the continuity is unbroken. The evolution proceeded by slow and often imperceptible steps; there has been change, but no catastrophe. A knowledge of the steps is of great value to a student of law, because the connection between the origin of a rule of law and the meaning of the rule, is much closer than that which subsists between the derivation and meaning of a word.

3. Another advantage may be gained from Roman law. This benefit is, however, too often lost, and is, besides, relative to the present state of English law. Owing to the almost necessarily fragmentary way in which English law must be studied, it is of great advantage to acquire a knowledge of a complete system of law, viewed as one whole. This advantage we may derive from Roman law, on account of its small bulk. There is very much in Roman law of little or no use to an English student, and what remains is not too great for ordinary dili-

gence. All the various parts of law are related to each other, either as approaching the same end from a different point of view, or as supplementing each other's defects, and hence a knowledge of law in fragments is necessarily defective. It is not easy, if it is even possible, for a student to obtain a complete outline of English law; but it is possible to do that for Roman law. Such a systematic knowledge is of great use in facilitating the acquisition of English law or of any other system.

4. There is one benefit that ought to be gained from the study of Roman law, which as yet it is not in one's power to obtain. The study of Roman law, as a growth, is not complete unless it is accompanied by a similar study of English law, as a growth. We ought to pursue the same historical and systematic treatment of English law that we do of the Roman law. But the material is too scanty. No professor of English law has done for it what Gaius did for Roman law. Isolated works there are of value and importance, but it is nevertheless a regretful circumstance that we have not a full and accurate history of the development of English law, and very inadequate knowledge of the extent to which the English law is original, and how much it owes to other, and chiefly the Roman systems, and I venture to think that the study of Roman law will never attain its best place in legal education, until it is taken along with the law of our own country. That is a view which we may hope one day to see filled up, with the result of making law not only more interesting, but more intelligible.

At present the English law has reached a point similar to that at which the Roman law had arrived about a generation or less before the time of Justinian. There is in fact much more likeness between the two than is sometimes supposed. Seeing the Roman law in a reduced and expurgated form, we are apt to ascribe to it a fondness for general principles, which is, perhaps, not undeserved, but which would probably be merited as much by our own law if it were treated in the same way. The digest consists of about 150,000 verses, and the code and novels of Justinian are nearly of the same extent. If now we

began, as we have done, by an expurgated edition of the statutes; if we reject local and temporary statutes, and, above all, if we were to consolidate most of the remaining acts, we should have accomplished for our statute law more than was done by the eminent Justinian and his coadjutors. The size of the digest, containing, as it does, only 150,000 verses; compares favorably with the bulkiness of our own law; but then we must remember that the digest is a mere residue, a twentieth part only of the law before Justinian. Remembering, also, that a great part of the digest consists of reports of cases, written with the brevity almost of marginal notes, in the English reports, we must admit that, considering the absence of printing, the Romans attained as conspicuous a success as ourselves in swelling the dimensions of the law to an extent beyond any human capacity. The great bulk of the Roman law was case law, and in that lies its value. It is the record of many minds working out by daily experience the adjustment of legal rules to the facts of life, and in that circumstance, more than in its being a sort of treasure-house of the inspiration of legal genius, must we recognize the real importance of Roman law. The English and the Roman possessed the same practical turn of mind, the same tenacious adherence to the usages of the past, combined with a certain openness to new light.

In attempting, therefore, to fix the place of Roman law in legal education, we must keep this consideration in view. But we ought not to forget that to some branches of English law, Roman law is by far the best introduction. Ecclesiastical law has been shorn of its dimensions, but it still provides a certain quota of litigation. In times of peace, the Court of Admiralty does not make any severe demands on counsel and attorneys, but the frequenters of that court must be often at a disadvantage if they are ignorant of Roman law; and in the law of wills, and in international law, so much is due to the Romans that an acquaintance with the law of Justinian is almost an indispensable introduction. But even for the branches of law that seem least directly connected with Roman law, we must remember that the study of Roman law, even if confined to a dry knowledge of its rules, is far from lost. To no

small extent, the learning of Roman law is the learning of English law, for a good deal of English law is taken bodily from the Roman law. There is no room for doubt that a man somewhat acquainted with Roman law, say with the Institutes of Justinian, gains rather than loses in his capacity for rapidly assimilating English law.

Roman law thus appears to occupy the same place in the course of legal education that pure scientific study does in medical education. It is a preparatory study, familiarizing the mind with the methods, and, to a certain extent, with the subject matter of the strictly professional work. It is such studies that dignify a profession; which elevate the mind of professional men, and enable them to take a wide view of their work. At the same time it ought to be borne in mind that Roman law is a preliminary study only. A great authority in medical education has recently raised his voice against the sacrifice of professional to preparatory studies. There does not appear to be any danger, for some time at least, of the scientific studies of young lawyers being carried too far; but it is not an unusual thing in this country to rush from one extreme to another; and it may be that Roman law, which has been so long left out in the cold, may now be overfed and bloated. If we may go by the time allotted to law studies in England, I think one year is enough for jurisprudence and Roman law. The time altogether may be too short. For the law school of Constantinople five years was the curriculum, and it is difficult to see how any one can get even a moderate acquaintance with the English law in three years; but, having regard to that period, one of the three is as much as can be spared for Roman law.—W. A. HUNTER in the *Law Magazine and Review*.

*IV. FOX'S LIBEL ACT.*

Though the act which declares the rule of law to be that on the trial of an indictment for libel, the jury may give a general verdict of guilty, or not guilty, upon the whole matter put in issue, and shall not be required by the judge to find the defendant guilty, merely on proof of the publication of the alleged libel, and of the sense ascribed to it by the indictment, was introduced by Mr. Fox, and is always known as "Fox's Libel Act," yet the merit of bringing about that measure is without doubt mainly due to two great lawyers, Lord Camden and Lord Erskine.

Lord Chancellor Camden was one of those admirable men in whose life, public or private, calumny itself could find no flaw. Although he was the son of a distinguished lawyer, Sir John Pratt, the successor of Lord Macclesfield as Chief Justice of the King's Bench, and was gifted with rare talents and industry, he passed so many years of his professional life in briefless obscurity, that at one time he seriously contemplated entering the church. Happily for the profession, and for his own fame, he was dissuaded from this step, and induced once more to "ride the circuit" which he had travelled fruitlessly for eight or nine years. On this occasion a friendly stratagem procured him an opportunity for displaying his powers, which he used to such advantage that a respectable practice immediately flowed in upon him. He first attracted public attention in a prosecution for libel (*Rex v. Owen*), when he boldly asserted the then startling doctrine that, by the law of England, the judge had no right to direct the jury to confine their verdict to the question of publication, and to the correctness of the innuendos, leaving the bench to decide whether the matter itself was libellous.

This was in 1752, and for forty years, Pratt consistently and earnestly maintained the doctrine he had then, against the entire current of legal opinion, dared to assert. In 1792, after

having enjoyed the highest honors of his profession, and gained for himself the reverence of the people as the guardian of their rights, and of the bar as a profound and upright judge, he had the satisfaction of conducting in its passage through the house of lords, the bill which *declared* the law to be what he had always contended it was. This was the last public service he performed.

At this day the arguments so frequently used by Lord Camden seem to us unanswerable. "A man may kill another in his own defence, or under various circumstances, which render the killing no murder. How are these things to be explained?—by *the circumstances of the case*. What is the ruling principle?—the *intention* of the party. Who decides on the intention of the party? The judge? No! the jury. So the jury are allowed to judge of the intention upon an indictment for murder, and not upon an indictment for libel!! The jury might as well be deprived of the power of judging of the facts of *publication*, for that likewise depends upon the *intention*. What is the oath of the jury? Well and truly to try the *issue joined*—which is the plea of *not guilty* to the whole charge." And yet Lord Mansfield never swerved from his opinion that the judge alone was concerned with the question, whether the writing complained of was libellous. He maintained this to be the law in every case, in his long career, where the question arose before him, and when Erskine united all his eloquence and logic in one impetuous stream against this dangerous doctrine, he put him aside, to use the advocate's own words, "as you do a child when it is lisping its prattle out of season." Lord Eldon too, stoutly maintained the same opinion, and begged the house of commons, in the debate on Fox's Act, not to act with precipitation in unsettling a rule which had been regarded as law for a century. Thurlow, Kenyon, Buller, in truth all the lawyers of that day, great or little, concurred in holding obstinately that the jury had no business to meddle with the circumstances which make the publication criminal or innocent, and looked upon the libel act as a dangerous innovation, prophesying the usual doleful consequences to the constitution if it should become law.

Amongst the whole profession Camden and Erskine were alone found to raise their voices against the prevailing opinion.

History furnishes us with an impressive scene in the debate in the house of lords which decided the fate of Fox's Act. It was the last public question in which the venerable Camden was to take part. He was approaching four score years, and he rose to address the house slowly and painfully, leaning upon a staff for support. "I thought," he said, "I thought never to have troubled your lordships more. The hand of age is upon me, and I have for some time felt myself unable to take an active part in your deliberations. On the present occasion, however, I consider myself as particularly, or rather as personally bound to address you—and probably for the last time. My opinion on the subject has long been known; it is upon record; it lies upon your lordship's table. I shall retain it, and I trust I have yet strength to demonstrate that it is consonant to law and the constitution." We are told that his voice, which had been at first low and tremulous, grew firm and loud, and all his physical, as well as his mental powers, seemed animated and revived. He then stated, with his wonted precision, what the true question was, and he argued it with greater spirit than ever. Lord Thurlow, disappointed in his hope that the bill would be defeated, did his best to damage it in committee by a nullifying amendment. But Camden refused to allow any qualifications, whereupon the following dialogue ensued:

Lord Chancellor. "I trust the noble and learned lord will agree to a clause being added to the bill, which he will see is indispensably necessary to do equal justice between the public and those prosecuted for libels. This clause will authorize the granting of a new trial, if the court should be dissatisfied with a verdict given for the defendant."

Earl Camden. "What! after a verdict of acquittal?"

Lord Chancellor. "Yes!"

Earl Camden. "*No, I thank you!*"

These were the last words Lord Camden ever uttered in public

But great as was the influence of Camden's character and labors in securing the establishment of the law of libel on a rational basis, it is doubtful whether he would have lived to see the triumph of his opinions, had he not found a powerful ally in Erskine. Erskine's efforts were more splendid and striking, and being enacted on a more public stage, forced upon the mind of the people and of Parliament the necessity for legislative action. It was in the Dean of St. Asaph's case that Erskine first had occasion to contend for the principle, that it is the province of the jury, on an indictment for libel, as in other criminal cases, to bring in a verdict upon the whole matter in issue. Buller was the judge, whose pupil Erskine had been, and for whom he entertained a sincere feeling of reverence. This, however, did not prevent a fierce altercation between bench and bar, when the jury, eager to reward the eloquence of the advocate by a complete acquittal, brought in a verdict of guilty of publishing *only*. The last word Justice Buller refused to record, insisting that the jury did not understand their verdict

Erskine. "The jury do understand their verdict."

Buller, J. "Sir, I will not be interrupted."

Erskine. "I stand here as an advocate for a brother citizen, and I desire that the word '*only*' shall be recorded."

Buller, J. "Sit down, sir; remember your duty, or I shall be obliged to proceed in another manner."

Erskine. "YOUR LORDSHIP MAY PROCEED IN WHAT MANNER YOU THINK FIT; I KNOW MY DUTY AS WELL AS YOUR LORDSHIP KNOWS YOURS. I SHALL NOT ALTER MY CONDUCT."

A verdict of "guilty of publishing, but whether a libel or not, we do not find," having been at length brought in, Erskine afterwards moved for a new trial on the ground of misdirection. This he did with no hope of success, but to resist what he thought to be an illegal and unjustifiable precedent, and to call public attention to it. Fox often declared his argument on this occasion to be, in his opinion, the finest piece of reasoning in the English language, though the judges of the King's Bench were unmoved by it, and Lord Mansfield



dismissed the whole question with a doggerel rhyme. The judgment was arrested on another ground, but the judges of England had, as far as lay in their power, placed the fatal doctrine that *libel or no libel* was a pure question of law, and one with which juries had no concern, beyond the reach of further danger. The result of the case was, however, far different to what it seemed likely to be. Instead of establishing a rule of law, which, like the rule in Shelley's case, would endure impregnable to all the assaults of reason, it caused so much alarm in the public mind that Fox's Act was called for, which forever subverted the doctrine by *declaring* the law to be the reverse of that doctrine. It fell to Erskine, who had made such a gallant and glorious struggle in the cause, to support the bill as Mr. Fox's seconder.

It will gratify equity lawyers to know that the clause in the act requiring the judge, according to his discretion, to give his opinion on the whole matter in issue, which has caused so much trouble, and in some cases has nullified the effect of the act, was the handiwork of Lord Eldon. "Mr. Fox's Act," says Lord Campbell, "only requires the judges to give their opinion on matters of law in libel cases as in other cases. But did any judge ever say, 'Gentlemen, I am of opinion that this is a wilful, malicious and atrocious murder!' For a considerable time after the act passed against the unanimous opposition of the judges, they almost all spitefully followed this course. I myself heard one judge say, 'As the legislature requires me to give my own opinion in the present case, I am of opinion that this is a diabolically atrocious libel.'"

In our own day judges are for the most part reconciled to the necessity of leaving the whole issue to the jury, and seldom attempt to diminish their privileges by such a direction as that just mentioned. Seditious libels, to which Fox's Act was principally directed, are unknown to us, and no judge is likely to be led astray by an excessive reverence for royal prerogative or fear for the stability of government. Still prosecutions for libel at the instance of the Crown, though happily rare, have occurred amongst us. In such cases it behooves

the judge to act circumspectly, lest the suspicion may be aroused that the baleful influence of party feeling has invaded even the bench, and that the spirit of the act has been overridden by a specious adherence to the letter.—*The Canada Law Journal.*

V. *DONATIONES MORTIS CAUSA.*

So much doubt has, from time to time, been expressed as to the policy of still allowing *donationes mortis causa*, that it is surprising that no attempt has ever yet been made to remove this undoubted anomaly from our law. So long ago as 1827, Lord Eldon, in giving judgment in *Duffield v. Hicks* (1 Dow & Clarke, 1), said: "It would be a much better improvement of the law than many of these improvements which have been lately talked of, if the *donatio mortis causa* were struck out altogether," and Lord Hardwicke and other distinguished judges have expressed their regret that the Statute of Frauds, when abolishing nuncupative testaments, did not include these death-bed gifts. It will be seen from the cases that the law has always regarded them with the utmost suspicion, because they offer so easy a means of evading the provision of the Statute of Frauds against nuncupative testaments. We may add that the Roman law, from which we have adopted, for the most part, the principles as well as the name, looked upon these gifts with equal or even greater suspicion, for Justinian ordered that five witnesses should be requisite to prove them. 2 Inst. tit. 7, *De Donationibus*.

The most recent case on this subject (*Dunn v. Boyd*), is reported in the Irish Law Times reports last week. In noticing this case, it may be useful to take the opportunity of glancing at the authorities on the point, and endeavoring to ascertain what the law now is. The facts in the case alluded to are these: Henry Robinson, on the 20th March, 1873, being then afflicted with a mortal illness, told his sister, Sarah Dunn, that he wished that on his death his sister, Annie Boyd, should get £300 out of his property, and that all the rest of his property should go to Sarah Dunn and her husband, James Dunn, except £450 to their children. On the same day, Henry Robinson said that if James Dunn would get Mr. Mathewson or Mr. James Carlisle, J. P., to go with him to the Provincial Bank, it

would be all right. On the following day Henry Robinson desired James Dunn to send for Mr. Mathewson. When Mr. Mathewson arrived, Henry Robinson desired Sarah Dunn to bring him the drawer which contained his paper, but being unable to find what he wanted in it, by reason of his weakness, he said to Mr. Mathewson the words "provincial receipts." Mr. Mathewson then found three deposit receipts of the Provincial Bank. H. Robinson told Mr. Mathewson to set down the amounts, which he did; and then directed him to write the following order, which was signed by Robinson: "21, Garmoyle street, Belfast, March 21, 1873. Please deliver to Mr. James Dunn, the value of the three deposit receipts, amounting to £1,098 10s. 5d., with interest thereon. H. Robinson. To the manager of the Provincial Bank, Belfast." The only deposit receipts possessed by him were these three receipts. Robinson, after signing the order, either handed the receipts to J. Dunn, or directed Mathewson to hand them to him. Mathewson then suggested to him that as J. Dunn was to obtain payment of the receipts, he should endorse them. At this suggestion Robinson proceeded to endorse the deposit receipts, and endorsed one of them with his usual signature, which was thereupon handed back by Mathewson to J. Dunn. Robinson then proceeded to endorse another deposit receipt, and wrote thereon the letters "H. R." He then became faint, and was unable to complete the endorsement thereof, or to endorse the remaining deposit receipt. All the deposit receipts and the aforesaid order remained in the possession of J. Dunn. Robinson died within a few minutes afterwards; he left no will, and was a widower, without children. Letters of administration were granted to Sarah Dunn. The bill prayed for a declaration that the delivery of the three bank deposit receipts constituted a valid *donatio mortis causa* to J. Dunn, upon trust. Upon these facts Vice-Chancellor Chatterton delivered judgments as follows: That the validity of the *donatio mortis causa* must depend upon those facts which occurred on the day of the death of the deceased; that in all cases of this class, the question of the intention must be clearly proved (referring

to McGonnell v. Murray, 3 Ir. L. J. 568); that the order for payment could not operate as a *donatio mortis causa*, as it was a check, and revoked shortly after it was signed; that the proof of actual manual delivery was not clear; that assuming that what took place was a manual delivery, there was no evidence of a gift; that if there was any evidence of a gift, it was of an absolute gift to James Dunn; that, though a *donatio mortis causa* may be given with a condition of trust, here there was no contemporaneous declaration of trusts; and that for these reasons there was here no *donatio mortis causa*.

Ward v. Turner is the leading case on this subject. In that case (reported in 2 Ves. Sen. 431-7), it was held, as regards these gifts, that an actual delivery is indispensable to vest the property, if the subject-matter is capable of delivery. If it be not so, there must be a delivery of what is equivalent to it at law. In the case of stock in the funds, delivery of the receipts for the price will not pass the money, though accompanied by parol expressions of gift in contemplation of death. The principles elucidated in the elaborate judgment of Lord Hardwicke had not been since materially departed from; and though at one time there was a tendency to extend those principles (see Vice-Chancellor Hall's judgment in Moore v. Moore, L. Rep., 18 Eq. 474); the more recent cases revert to the old strictness of construction. M'Gonnell v Murray, 3 Ir. Eq. R. 460; Gosnahan v. Grice, 7 L. T. Rep., N. S. 81; *In re Patterson*, 10 L. T. Rep., N. S. 801. In Moore v. Moore (*ubi sup.*), Vice-Chancellor Hall, having to decide whether (1) railway stock, and (2) a banker's deposit note, could be the subjects of *donationes mortis causa*, held on the authority of Ward v. Turner (*ubi sup.*), that the first could, and on the authority of Witt v. Amis (*ubi post*), that the second could not be so; but hinted that, although able thus to follow the letter of both judgments, they were hardly reconcilable in principle. The doctrine of Witt v. Amis (4 L. T. Rep., N. S. 283), and Amis v. Witt (33 Beav. 619), that a policy of life insurance and a banker's deposit note may be the subjects of a *donatio mortis causa*, was also doubted in M'Gonnell v. Murray (*ubi sup.*), where it was held that the delivery of the book

of a depositor in a savings bank was not sufficient to constitute a gift of the money deposited. In *Gosnahan v. Grice* (*ubi sup.*), Lord Kingsdown, in giving judgment against the validity of the gift sought to be established in that case, said: "The burden of proof is on the donee, and his case must be supported by the clearest and most unequivocal evidence." This is the real ground of the decision in *Dunn v. Boyd*. Had there been clear evidence of the actual delivery of the bank deposit receipts to the alleged donee, it might have been difficult to distinguish this case from *Moore v. Moore* (*ubi sup.*), although the principles laid down in *Ward v. Turner* (*ubi sup.*), would certainly seem opposed to the recognition of such delivery. As regards the declaration of trust, there is no doubt that such a condition will not invalidate a *donatio mortis causa* (*Drury v. Smith*, 1 P. Wms. 404; *Hills v. Hills*, 8 M. & D. 401); but what has been stated about the delivery applies also to the declaration of trust, that it must be established by the clearest evidence; and it must be contemporaneous with the delivery. As regards the order for payment, written by Mathewson and signed by deceased, that was, as Vice-Chancellor Chatterton says, a check, and it is well established that a check can not operate as *donatio mortis causa*, unless cashed in the life-time of the donor. *Tate v. Hilbert*, 2 Ves. 111; *Hewitt v. Kaye*, L. Rep., 6 Eq. 198. The points directly decided in *Tate v. Hilbert* are that a *donatio mortis causa* must be made in contemplation of speedy death, and so that it is only to take effect in case of death, and that a check will not operate as an appointment, if the donee retain it in his possession till after the donor's death. Precisely to the same effect—that a *donatio mortis causa*, when a check, is revoked by the death of the donor if not previously cashed—is *Hewitt v. Kaye* (*ubi sup.*). The only case that throws any doubt on this doctrine (unless the extension of principle in *Witt v. Amis*, *ubi sup.*, and *Moore v. Moore*, *ubi sup.*, be thought to go so far), is *Lawson v. Lawson* (1 P. Wms. 441), where a husband, having drawn a bill on a goldsmith for £100 for his wife's mourning, that was held a good *donatio mortis causa*. This decision, however, which Lord Hard-

wicke said he did not very well understand, is well distinguished by Lord Loughborough in *Tate v. Hilbert* (*ubi sup.*): "There was an appointment of the money in the banker's hands to the extent of £100, for the particular purpose expressed in a written appointment, which is a purpose that necessarily supposes his death. Therefore this case is perfectly well decided. But upon that decision I cannot say, that in all events drawing a cash note upon a banker is an appointment of the money in his hands." The case of *Boult v. Ellis* (17 Beav. 121), is perfectly in concord with these cases, though it has been sometimes brought forward against them. There A., four days before his death, gave his wife a check for £1000, which she exchanged by his direction for one of B.'s, which was post-dated, and therefore void. B. cashed A.'s check two hour's before A.'s death, and B. afterwards gave A.'s widow a good check for £1000, which was paid to her. Held, that it was a good *donatio mortis causa*. Here A.'s check was cashed before it was revoked by A.'s death, and the fact that A.'s wife had paid it away, and, through a mistake of the payee, not received consideration for it, could not invalidate it.

As regards the fact of the deposit receipts in *Dunn v. Boyd* not having been completely endorsed, that would probably not of itself have affected the validity of the gift. In *Veal v. Veal*, (27 Beav. 303), it was decided that a promissory note, payable to order, might be the subject of a good *donatio mortis causa*, though unendorsed. These gifts are analogous to legacies; they are subject to the claims of creditors (*Tate v. Hilbert, ubi sup.*), and no probate is required of them. *Lawson v. Lawson, ubi sup.* It was at one time doubted whether they were not constructively abolished by the wills act (7 Will., 4 and 1 Vict. c. 26), but this doubt was negated by *Moore v. Durton* (4 De G. & J. 517). A gift of bills of exchange payable to the donor or order, is a good *donatio mortis causa* (*Rankin v. Weguelin*, 27 Beav. 309), so is a mortgage, or a bond given as a collateral security for money due on mortgage (*Duffield v. Hicks, ubi sup.*). In this last case Lord Eldon overruled *Duffield v. Elwes* (1 Sim. & Tin. 239), although that had been decided by Sir John Leach, on Lord Eldon's advice. Lastly, in

*Re Patterson*, it was held that where circumstances indicate an intention to make a testamentary gift, but the gift fails through want of proper attestation, a *donatio mortis causa* will not be presumed. 10 L. T. Rep., N. S. 801. The reason of this is not only the suspicion with which these gifts are always to be regarded, but also the rule that the donor must, at the time of the supposed gift, part with all dominion over it. *Hawkins v. Blewitt*, 2 Esp. 663.—*The Law Times*.



## Book Reviews.

**DE LAUDIBUS LEGUM ANGLIÆ.** A Treatise in Commendation of the Laws of England. By CHANCELLOR SIR JOHN FORTESCUE, with translation by Francis Gregor, notes by Andrew Amos, and a Life of the author by Thomas (Fortescue) Lord Clermont. Cincinnati: Robert Clarke & Co. 1874. pp. Lxiv., 302. 8 vo.

An interesting comparison could be drawn between Fortescue and Littleton, and between the works to which each owes his celebrity in English law. The two men were contemporaries, though Littleton was some years the younger. No doubt he practised often before Sir John, during the eighteen years that the latter presided over the Court of King's Bench, though the Year Books only mention two instances (p. 28, Hen. VI., pl. 1, and p. 310, Hen. VI., pl. 4), and, we may reasonably suppose that his favorite arena would be the common pleas, of which he afterwards became a judge. Here alone he could find use for that wonderful mastery of the intricate law of tenures which produced "the most perfect and absolute work that ever was written in any human science," as the English lawyers at least have thought; here alone, too, he could "employ his courage and care in one of the most honorable, laudable and profitable things in our law, the science of well pleading in actions *real* and personal;" and here his cautious temper could avoid, even in those troublous times, such political questions as most constantly arise in the criminal and supervisory jurisdiction of the King's Bench. So he "kept out of politics" and prospered, whether the roses in his path were red or white. Henry made him judge of the Marshalsea, Edward raised him to the bench of the Common Pleas, where he sat for fifteen years, and until his death, though two violent changes in the possession of the throne must have made as many new commissions necessary, and one or both of them would have cost a more ambitious man, or a less able lawyer, his seat.

Sir John Fortescue certainly could not, perhaps would not, have

retained his place under such circumstances. Descended from a race of Norman soldiers, whose English citizenship dated from Hastings, it is not improbable that he himself may have fought by his father's side at Agincourt, and spent the first years of manhood in the castle Meaux, which his father kept for Henry V. against the rebels, who denied his title to be king of France.\* Or even if he was left at home and bred at the Inns of Court, we may gather from his own pages that that did not necessarily imply an exclusive devotion to pleadings and tenures. The youthful son of the Governor of Meaux would, no doubt, learn "singing and all kinds of music, dancing and other such accomplishments (which are called revels) as are suited to their quality, and such as are usually practiced at Court," and his whole career shows that he knew how to win favor at the "Court" thus referred to, at least as well as in the courts of law. To his credit be it said, that the favor seems to have been honestly deserved, as it certainly was gratefully remembered. Fortescue indeed, it would have been for the weak king and his high-spirited wife if all upon whom their favor shone had been as true as Fortescue when the shadows of adversity fell upon them. His rise was certainly rapid, even in an age when the high legal offices were commonly given to much younger men than now. He probably was made a serjeant as soon as his standing admitted (Life by Lord Clermont, p. vii.) and had worn the coif only eleven or twelve years at most, when he was raised at once to the position of Chief Justice of the King's Bench, without having filled any other judicial place, except a temporary service a year or two before, as judge of Assize. Considering that he himself was the author of the oft-quoted requirement of a knowledge and practice of twenty years (*lucubrationes viginti annorum*) for the formation of a judge, we must acknowledge that the gulf between the theory and practice of legal education was at least as wide in the fifteenth century as that of our severe professional sticklers for a "fixed term of study" in the nineteenth. The Year Books give us no reason to believe that he had much practice until the two or three years im-

\*Fortescue must indeed have been entered as a law student as early at least as the year (if not two years) before that battle, since he was made a serjeant in 1429 or 1430, and says himself at a latter period, "To this day no one hath been advanced to the date and degree of a serjeant at law till he hath been first a student, and then a barrister full sixteen years. (De Laudibus Ch. L.) But the entering of one's name probably did not imply continuous residence any more at that period than in modern times.

mediately preceding his elevation to the bench. Lord Clermont, indeed, says: "After Fortescue's promotion to be serjeant, the Year Books are no longer silent concerning him, but make frequent mention of his arguments. His practice was large, and his knowledge of English law conspicuous." Life p. xi.. But the remark is only correct for the period above mentioned. During the ten years that immediately followed his assumption of the coif we have noticed his name but twice in the books. Once in Michaelmas Term, 8 Hen. VI., pl. 16, fo. 8, when he spoke simply to refer the court to a case decided by them the previous year; and again two years later, Mich. 10 Hen. VI., pl. 84, fo. 24, when he pleaded the general issue for one of the defendants, but took no part in the subsequent discussion. The first of these entries, by the way, seems to settle a chronological question of some importance in Fortescue's life, upon which Lord Clermont follows Dugdale, while Mr. Foss, in his *Lives of the Judges*, differs from them. The question is whether he became a serjeant in 1429 or 1430. As Henry VI. ascended the throne September 1, 1422, the Michaelmas term of his *eighth* regnal year must have been held in November, 1429. That Fortescue was a serjeant then can not be doubted, since that Year Book is always careful to designate as *apprentices* all who took part in the discussions below that degree. Perhaps it is not altogether fanciful to suppose that this solitary remark of the new-made serjeant, unconnected with the case, was offered by him, or recorded by the reporter, rather as a memorial of his first appearance, than for its pertinence to the matter in hand. It was what he or one of his heavily-jocose brethren might have called "taking the *esplees*" of his new office.

There may be other mentions of Fortescue's name during these ten years, that we do not now recall, but at all events they are very few, and it is certain that he does not appear in any of the great field-days when the judges and leading serjeants all took part in the discussion of some perplexing question—some *bonam materiam*—ad-journed into the Exchequer Chamber. This is the more significant when we remember that the number of serjeants at that time was very small. There is even a case somewhere in that Year Book, though we cannot now turn to the exact page, where one of the serjeants who had appeared for plaintiff below was obliged to turn around and take the side of one of the defendants in the Exchequer Chamber, because otherwise there would not have been enough to

present all possible views of the question fairly! We think it is fairly inferable, therefore, that Fortescue was otherwise employed during most of these years, and that the broad culture and statesmanlike wisdom that he displayed on the bench, as well as in his books, were formed in a different school from that in which Littleton prepared himself to write the tenures.

It should, indeed, be mentioned that the Year Books of Henry VI. are not complete. Among other missing years are the fifteenth, sixteenth, and seventeenth of the reign, September, 1436, September, 1439. If we had these we should, no doubt, find more of Fortescue in them than in the earlier ones, and should probably be able to trace the growth of that leading practice in which we unquestionably find him in the eighteenth year. To increase the difficulty of any conclusion, the terms of the 18th year are evidently misplaced, so that it is in vain to attempt any inferences from a comparison between them as to the growth of his practice. But whether we confine his active career to the two years in which we have proofs of his participation in almost every case, or extend the term back over the missing years, he certainly affords a most striking example of brilliant and rapid success, and a complete contrast to the slow and patient toil of Littleton. In the fourteenth year of the reign his name does not occur, and even if we assume that his practice commenced with the first unreported year, we shall have but five years in all of real professional practice before he took his place (January 25, 1442) as Chief Justice of the King's Bench.

The record of his judicial activity is comprised in the second part of Henry VI., which has been pronounced by high authority the most valuable of all the Year Books. His own contributions, indeed, to it, if judged by mere quantity, are not very great. The book is essentially a report of the Common Pleas, that "lock and key of the common law;" and while Littleton's name occurs on almost every page, showing that during these twenty years he was engaged on one side or the other of almost every important case, the most we learn of Fortescue is from a score or so of cases argued by all the justices together in the Exchequer Chamber, with perhaps as many more that for some special reason were reported in the King's Bench itself. But one can not read even these scanty memorials without being struck with the difference between him and the mere lawyers who surrounded him. On all he

says we find the stamp of his own genius. While the rest are busy with technical rules, he loves to argue from the nature of the case and the laws of reason. His favorite maxim was, that "common law is common reason," and whenever their fine-spun arguments could not bear this test, he brushes them away with a contemptuous force that allows us to see under all the disguise of black letter and law French, and in spite of four intervening centuries, how the thorough jurist and statesman towered over the mere practical lawyers. When Prisot, the learned Chief Justice of the Common Bench, and his associate (and successor), Markham, had urged the technical forms and courses of the law against him, he breaks out: "Sir, the law is just as I have told you, and has been so ever since law began. We have various courses and forms held for law, and so held and used for good reason, which reason may not always be ready at hand, but it can always be found by study and labor. And if any form or course now is or has been used against reason, it were not a bad thing for us to amend it." And then, after explaining the case, he adds with a delicious touch of satire, "perchance that is the reason, and if it is not, when I have leisure I will find you a better one." Quatremain's case, 36 Hen. VI. 25.

The office of a judge in those days was by no means a laborious one. We learn from Fortescue himself that they only sat from eight to eleven A. M., and gave the rest of the day to the "study of the laws, reading of the Holy Scriptures, and other innocent amusements, at their pleasure; it seems rather a life of contemplation than of much action; their time is spent in this manner, free from care and worldly avocations." De Laud. Ch. 51. How much time the good chief justice spent on "the reading of Holy Scripture" we will not presume to guess; but it is evident that it did not prevent him from all worldly avocations. He had probably been in Parliament from his youth. At all events, one John Fortescue represented Tavistock in Cornwall, in the last parliament of Henry V., and in the first of Henry VI., and Plymton in the Parliament of 1629-30; and from the vicinity of both these places to his home, and the fact that Henry Fortescue (his elder brother's name), appears at the same time as Knight of the Shire for Devon, in which county both resided, there can not be much doubt that this was the young apprentice to the law. His judicial position instead of excluding him from Parliament as now, rather involved attendance there as a matter of course; and he was one

of the "Triers of Petitions" from 1444 to 1455. His loss of the place after that time is evidently connected with the increased power of the Yorkist party. He was too closely identified with the Queen's friends to expect any favor from the other side; and from what we know of his character we are not surprised to find that he either could not or would not preside in his court after Easter term, 1460, and that for the brief remainder of the reign, Markham, though still only the senior puisne judge, appears in his place in the King's Bench and Exchequer Chamber. When the judges met for Easter Term, 1461, what a wagging of beards, and shaking of coifed and solemn heads there must have been, as the news went around that Monmaistre Fortescue, a chief justice of almost three score and ten, had fought in the thickest of the fray on Towton field only the Sunday week before—and had fought on the losing side!

We must not dwell on the remainder of his life, though there is nothing in all his prosperity that attracts us so much as that picture of the "grave old Knight" in exile at St. Mighel, but still true to his country, and devoting all his powers to train the banished prince to be a good and freedom-loving king, when he had his own again. "We brethe alle in grete poverte but yet the quene susteyneth us in mete and drinke, so as we brethe not in extreme necessity. Her highnesse may do no more to us than she doth." Stout, grateful, brave and wise old heart! But all that followed is too familiarly known to be repeated here, and it is high time that we went back from the author to his book.

What title he himself gave to it, or whether any, is very uncertain. The one by which it has so long been known seems to be a conjecture of Selden's. Both our earliest informants in regard to Fortescue's writings, mention a book *De laudibus legum* among them; but both agree in identifying the present work (quoting its opening words, after the manner of their time) with another treatise called *De discrimine legum*, "Of the difference of laws;" and it must be admitted that the careful comparison instituted in the work itself between the civil and common laws, makes this a better description of the contents than the vague and common place "Of the praise" or perhaps "merits of the laws of England." The first printed edition (1599) had a still different title, which was, no doubt, the work of the editor. "Of the political administration and civil laws of the most flourishing realm of England." But

when Selden published it with an elaborate commentary in 1616, he gave it the title which it has ever since borne ; not even translated in the English versions. Of praises of English law it, no doubt, contains enough ; but it gives a very insufficient and unjust notion of the book to regard it simply as an indiscriminate eulogy. When we consider the author's circumstances and purpose, its sobriety of tone and calmness of judgment are remarkable. Even the flattering colors in which he sets out the Inns of Court, the bench and bar, and some of the peculiarities of English procedure are a natural consequence of his main purpose in writing. Nor can we wonder if to the poor old exile these remembrances of happier things wore their brightest aspect. But the work is in the main a sober and, for its time, a profound treatise upon the principles of constitutional government, anticipating by almost three hundred years the very views that it is Montesquieu's chief glory to have expounded for the acceptance of modern Europe. The foreshadowing of modern thought in various passages is most striking. In one place we have the social compact almost as clearly stated as by a disciple of Locke ; in another the state is depicted as an organism, in language that might be accepted by a modern German jurist. The authors cited are of course those in vogue at the time ; but their number and selection testify to Fortescue's broad and Catholic culture. Aristotle, Augustine, the Roman jurists, Aquinas, the mediæval theologians and civilians, all are brought into the service not of a vain and pedantic erudition, but of a large soul, seizing upon truth wherever found. The English law is described with the free hand of a master who knew its principles, instead of the cautious chapter-and-verse citation that marked the mere lawyer then as it does to-day. And whoever can look beneath the barbarous mediæval Latin, and the quaint scholastic form of some of the arguments, will not fail to recognize, pervading the whole work, the spirit and fire of a man of true genius.

It must be admitted that this very breadth of view was unfavorable to the immediate usefulness of the book as a treatise on English law. The practitioner of the times, no doubt, looked in vain to Fortescue for an authority for or against him, when he and his opponent had "demurred in law," *i. e.*, had come to a full stop until some legal doubt were solved between them. If we accept Mr. Bishop's distinction between "principles" and "points," \*

\* See Bishop's *First Book of the Law*, § 285, *et seq.*

we may say that an author dwells too much on principles to be of much service in furnishing points to a brief. His object is to show the prince how the realm of England should be governed, not how questions of warranty or aide-prayer should be determined. From the first page to the last there is no reference to any of the multifarious "moot-points" in which his contemporaries delighted. Even the manifold details with regard to the practice of his time, the jury system, the criminal law, legal education, etc., which render the work to us a treasury of antiquarian knowledge, were inserted with no purpose of recording facts for the use of posterity. All are but instruments of his main purpose; to prove that the common law is a noble and harmonious system, founded on reason and the customs of the land, amended wherever necessary by statutes, consistent throughout with the law of God, and far better adapted to the happiness of England and England's king than the civil law of the continent.

To complete the comparison with which we began there only is needed a word on the history of the two works. What Littleton's has been to the English lawyer its numberless editions testify, and the countless references to its pages in all our subsequent law. On the other hand Fortescue's work, in spite of a traditionary reputation, has been comparatively neglected. During the great constitutional struggles of the seventeenth century, indeed, it furnished valuable weapons to the advocates of a free constitution, and we find it passing through a number of editions. But since that time it has almost been crowded out of the lawyer's library by a host of more practical and *useful* books. Only once in a century or so has some more thorough student, like Mr. Gregor, or Mr. Amos, fully appreciated its value. (The notes of the present edition by Mr. Amos are full of excellent matter; it is a pity that room could not also have been found for the learned ones of Selden). But while the "Tenures" have survived at last their long usefulness, and now slumber on the shelves, Sir John Fortescue's work, based on principles that know no change, and animated by a noble purpose, will be read as long as free government endures.

W. G. HAMMOND.



REPORTS OF CASES DECIDED IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FOR THE NINTH CIRCUIT: Embracing Cases at Law, Civil and Criminal, in Equity, Admiralty and Bankruptcy, and Cases on Appeal from the American Consular and Ministerial Courts in China and Japan. Reported by L. S. B. SAWYER, counselor at law. Vol. II. San Francisco: A. L. Bancroft & Co. 1875.

Though this comprehensive title reminds one of the grand disclaimer, "no pent up Utica, &c.," we hasten to assure our readers that Mr. Sawyer's second volume contains not a single case "on appeal from the American Consular and Ministerial courts in China and Japan." He should have added a note in imitation of the chapter "concerning snakes in Iceland."

In the one hundred cases which fill 660 pages of this volume, the profession will find comparatively little of general interest. The titles of "Court Martial," "Public Lands," "Donation Act," and "Mexican Grant," occupy considerable space in the index, the cases under which will doubtless prove of local interest merely. Alaska furnishes two cases, in which are discussed the extent and effect of the United States statutes in force in that territory. There are sixteen cases under "Bankruptcy," and seventeen under "Admiralty," the former of which will be of more general interest than the latter. *Edmondson v. Hyde*, p. 205, discusses the rights of an assignee against fraudulent mortgages made by the bankrupt; and it is held in *Re Morrill*, p. 356, that a mortgage made by a bankrupt on his stock of goods in trade, reserving power to sell as before, is fraudulent in law, acc. 11 Wall. 391. A married woman living separate from her husband, in California, was adjudged a bankrupt, in *Re Lyons*, 524.\* A lien on a vessel created by the state law of California, was enforced in *The Mary Gratwick*, p. 342. In *The Disco.*, p. 474, an ambiguity in shipping articles was resolved against the master and in favor of the seaman. *Tomlinson v. Hewett*, p. 278, recognizes by a decree for \$2,500 damages, the right of a seaman taken with small pox, to care, medication, nursing and subsistence at the expense of the ship. We note also in *Re Francis*, p. 286, under the head of partnership, an extended discussion of, closing with a dissent from, the rule of *Waugh v. Carver*, 2 H. Bl. 235, that participation in profits creates *ipso facto* a corresponding liability for losses. Two prominent cases are

\* See this case with note. 1 Central Law Journal, 237.

Union Mill and Mining Co. v. Ferris, p. 176, and same v. Dangberg, p. 450, which give studious attention to the relative rights of neighboring riparian proprietors in Nevada as to water required for milling purposes and adversely used for irrigation. Allegiance is discussed in McKay v. Campbell, p. 118, where it is held that the son of a British father and a Chinook mother, born in Oregon in 1823, is not a citizen of the United States, under the 14th and 15th amendments to the constitution. This person was born during the joint occupation of Oregon by Great Britain and the United States, and the district judge, no doubt correctly characterizes the case as one of novel impression (p. 127). The "common consent" in Oregon, which had treated persons of such birth as citizens; was disregarded by the court as of no authority whatever. In Magee v. Union Pacific R. R. Co., p. 447, the circuit court disclaims jurisdiction by removal from a state court, the sole ground offered being that defendant was a corporation created by act of Congress. Ethridge v. Jackson, p. 598, deduces the American rule as to judgment for costs from the statute of Gloucester, 6 Edward, 1, c. 1, decreeing that the costs follow the judgment for damages. A contribution to the literature of life insurance is made in the case of Young v. Mutual Life Co. of N. Y., p. 325, which relieves the plaintiff from a forfeiture by non-payment of premium, by reason of the alleged waiver by the insurer after the forfeiture accrued; reiterating the conclusion of other courts that forfeitures are not favored. The reporter omits to tell us, however, that the case has been appealed to the Supreme Court of the United States.

The collector of "curiosities of the reporters" will find some specimens in this volume. The word "cattle" in a statute includes "sheep," U. S. v. Mattock, p. 148 (just as an "ass" is a "horse." 2 Heiskell, 220). In Kentucky S. M. Co. v. Day, p. 468, *one hundred and forty-seven defendants, all designated in the bill by the name of John Doe*, moved for and secured a dismissal on the ground of the misnomer or misdescription. We learn in this volume, that an Indian is a person. United States v. Shaw-mux p. 364; and that "a printed name of counsel is not his signature," Nightingale v. O. C. Ry. Co., p. 338. The late Mr. Choate was willing to concede to the Chief Justice of Massachusetts that s-h-i-r-t spelled shirt, "without a decision of the Supreme Judicial Court to that effect." We are willing to make a like concession to Mr. Sawyer.

We could yield the learned reporter the space for a few such curiosities, but we are compelled to demur to such head-notes as this: "It is as much the duty of the master to restrain the violence of his officers as to repress the insubordination of the men." *Anderson v. Ross*, p. 91. This, as the sole syllabus extracted from the case, leads us to demand of the case an apology for appearing in the reports at all. Examining the case, we find it is but a supplemental opinion, reviewing a few facts, and adhering to a prior decision; but what that prior decision was or where rendered, Mr. Sawyer keeps carefully secret. We fail to see the particular use of the four cases at pages 476, 479, 481 and 482, respectively, of demurrers to indictments for offences under the U. S. election law of May 31, 1870. And we question the propriety of occupying nineteen pages with charges to the grand jury, even when as learned a justice as Mr. Field discusses and defends the grand jury system. In the interest of the profession, whose shelves are already too much crowded, we protest against all unnecessary or superfluous reporting.

In other particulars, Mr. Sawyer's style of reporting is exceedingly inaccurate. His index, under the head of "Contract and Construction," exhibits as a sub-title, "*Fourth Covenant of Escrow.*" The cis-Sierran lawyer who may be startled at these cabalistic words, will be relieved when he finds that they refer to a covenant in a certain agreement which figures prominently in the land-titles of Portland, Oregon, and is locally known as "the Escrow." The seventeen admiralty cases are not indexed under the head of "Admiralty." That head refers the student to thirteen other heads, one of which is "*Bill of Savings,*" whatever that may be. But there is no reference to the head of "Stale Claim," under which we find an important case, dismissing a libel on a claim two years old, where the rights of a mortgagee had intervened. The *Steamer Nevada*, p. 144. Typographical errors are common with this reporter. The last named case, at p. 145, refers to "State demands." The leading case on partnership above referred to, figures on page 26, as *Waugh v. Carou*. On the same page we find cited, 1 *Starkies*, R. 272. A celebrated text-writer appears on page 27, as *Saunders on Neg.*, and on page 29, as *Sanders on Neg.* The two cases of *Oh Chow et al.*, and *She At et al. v. Hallett*, reported on p. 259, are cited in the next succeeding case, on p. 263, as *Oh Chow Gin Lee*, and *Sheat and Wing Lock v. Hallett*.

These are venial faults. We find at p. 389 the report of the case of *Roff v. Wass*, as decided in the District Court of Oregon, and at page 538, the opinion of the circuit judge in the same case on appeal, with no note whatever to connect the two decisions together. The Circuit Court, at page 215, refers to the decision of the Supreme Court of the United States in *Gibson v. Warden*, as not yet reported (June, 1872), and at page 637, reference is made in like manner to a recent decision of the same court in *Lamb v. Davenport*. Both these cases are now in print, but Mr. Sawyer seems oblivious of the fact. We will assist his readers with the statement that the first of these cases appears in 14 Wall. 244, and the other in 18 Wall. 307.

The remedy for such reporting has correctly been said to be with the profession. It is in their interest that we urge them to insist that all reporters shall give us "the best."

The book is printed on fine, white paper, and, excepting errors in proof-reading, its mechanical execution and general dress are above mediocrity.

JAMES O. PIERCE.

**A TREATISE ON THE LAW OF NEGLIGENCE.** By FRANCIS WHARTON, LL.D. Philadelphia: Kay & Brother. 1874. pp. 932.

The law of negligence has recently grown into such proportions that it is now, perhaps, discussed and passed upon more than any other topic that occupies the attention of the courts. The business habits of the country arising out of railroads, carriers, municipalities, bailments, etc., have brought questions connected with negligence into unusual prominence.

Formerly it was only incidentally treated by text-writers. The celebrated judgment of Lord Holt, in *Coggs v. Bernard*, and the portions devoted to it in *Jones on Bailments*, and *Story on Bailments and Agency*, were the only attempts made to classify or systematize it, and these were necessarily partial and imperfect. But the vast improvements of modern times, and the unexampled increase of business in consequence thereof, produced by the construction of railways, telegraphs, and the extension of the routes of common carriers and express companies, to say nothing of the many instances in which remedies are now given for negligent injuries, has invested the subject with unusual importance. Not only so,

but it has been found necessary greatly to modify the rules previously laid down applicable to the subject, to make them conform to present circumstances, and more certainly promote the ends of justice. Owing to these considerations, within the last few years, four distinct treatises have been published, devoted specifically to the law of negligence—two in England, one by Mr. Campbell, and the other by Mr. Saunders, and two in this country, the first a valuable treatise by Shearman and Redfield, and the last by Mr. Wharton.

The treatise of Wharton is, in many respects, entirely different from any of its predecessors. In his introduction he enters into a learned dissertation on the Roman law, and maintains that our law has closely assimilated itself to the law of negligence as laid down by the Roman jurists; and that our knowledge of the civil law has been derived from two systems, first, from the studies and speculative conclusions of monkish writers of the middle ages, and, secondly, from the law as enforced and administered in Rome in the days of her business prosperity, the discovery of the latter being of comparatively modern origin. The first he calls the system of the scholastic jurists, and the latter, that of the classical jurists. Lord Holt and Sir Wm. Jones followed the principles as they found them proclaimed by the scholastic jurists and clung to the ideas of Mediævalism; for in their days the works of Gaius had not been unearthed or discovered, and Story who came after them acknowledged and accepted their doctrines in his writings, though he shrunk from giving their refinements practical application on the bench.

But Mr. Wharton contends that in matters of business, the common law has been driven by common sense and the inherent right of justice to accept the conclusions which the classical jurists arrived at years ago. According to this view negligence consists of but two grades—*culpa lata* and *culpa levis*—the negligence of one who is an expert and of one who is not an expert. *Culpa levissima*, or that slight negligence which is incident to all business transactions, is totally discarded as being something which is not punishable by law. The only enquiry which the law will regard, being, "what would an ordinarily prudent man do under the circumstances?"

To demonstrate this, he places in juxtaposition in his prefaces certain principles that exhibit the conflict that exists between the scholastic period of the middle ages, and the law as it was understood in the classic or ancient Roman time.

One illustration may be here adverted to. The scholastic doc-

trine was, that if the plaintiff's negligence, no matter how trivial, contributed to the injury, he was not barred, on the theory of *culpa levissima*, from recovery. On the other hand the more reasonable doctrine of the classical jurists was, that *Injuria non excusat injuriam*. No matter how negligent the plaintiff might have been, that did not excuse the defendant in negligently injuring him, if that injury could have been avoided by the exercise of the diligence good business men were accustomed to exercise in such matters. Nor could the plaintiff's *culpa levissima* bar the recovery. If it could, no plaintiff could recover; for there is no human action to which *culpa levissima* is not imputable.

To see the application of these rules and how courts have been guided by the different theories, it is only necessary to look at the earlier decisions and even some at the present day. There are courts that still hold that any negligence whatever on the part of the plaintiff, will wholly preclude a recovery, and where the evidence shows any degree of negligence contributed by the plaintiff, they are accustomed to order a peremptory non-suit. But a wiser and juster doctrine is obtaining and becoming more prevalent. That is, that the negligence of the plaintiff will furnish no excuse for an avoidable injury, and even if the plaintiff has been negligent, the defendant will still be responsible if he could have avoided the injury by the exercise of reasonable diligence and prudence.

But this examination of foreign jurisprudence as taught and practiced by the civil lawyers, though interesting and calculated to stimulate further enquiry, forms a very inconsiderable portion of the book. It is thoroughly practical throughout. It comprehends every head or division of which negligence is predicated. What is necessary to create negligence and the different kinds is succinctly and clearly considered. Then follows a very full and instructive chapter on casual connection. The succeeding chapters on liability of master for servant, on master's liability to servant, on municipal corporations, and private corporations, on contributory negligence, and provinces of court and jury, are able and concise outlines of these important and interesting subjects. The same is true of the chapters on the various branches of bailments, carriers of passengers and goods, collision of railroad trains with travelers, etc., etc.

The authorities are collected with wonderful industry and care, and the notes are what notes should be to render them useful to the

practising lawyer. The more important opinions are abstracted at great length, and given in the very words of the judges. This is a great benefit to those who have not ready access to large libraries, and especially serviceable to those who, whilst engaged in a trial, have not the time to hunt up the authorities. The diligence displayed in the collection of the latest cases is without a parallel, they being brought down to within a few weeks before publication. In these days of book-making, when volume after volume is issued from the press, many of which are of little value, it is gratifying to welcome a work like this, which is of unquestioned utility to the profession. Mr. Wharton's previous volumes had raised him to a high rank as a legal author, and this treatise will not detract from it, but rather enhance his reputation. It is written with great clearness, and the cases are exhaustively collated and discussed, but not slavishly followed; and altogether it is one of the most useful books that has yet been given to the bar.

DAVID WAGNER.

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A TREATISE ON THE LAW OF GUARANTIES AND OF PRINCIPAL AND SURETY. By HENRY ANSELM DE COLYAR, of the Middle Temple, Esquire, Barrister at Law. With notes to American cases, and an appendix containing the English and American statutes of Frauds and Perjuries, by JAMES APPLETON MORGAN, of the New York Bar. New York: Baker, Voorhis & Co., Publishers, 66 Nassau street. 1875.

Mr. De Colyar's work is written in a most interesting and attractive style, and will prove, within its limited field, a useful contribution to the literature of the law. It does not purport to be an exhaustive work, nor to cover the whole ground appertaining to contracts of Guaranty and Suretyship. It professes to deal only, or at least principally, with the *English* law on the subject, as distinguished, whenever distinguishable, from the American. To the American bar, therefore, its practical usefulness will be but limited.

The author subdivides his treatise into essays or (1) the operation of the Statute of Frauds upon the contract, (2) the character of a memorandum in writing which is sufficient to satisfy the requirements of the 4th section of that statute, (3) the liability of the surety, (4) the rights of the surety, and (5) the discharge of the surety. His discussion is mainly general in its character, and he

does not often extend it into the intricacies and distinctions of particular subjects. Special attention is given, however, to the subjects of continuing guaranties ; guaranties upon official bonds as affected by change of official duties, and, change of other circumstances ; the right of contribution and other rights appertaining to suretyship ; and the various modes in which the discharge of a surety may be effected. Upon these topics, as also upon the questions arising under the Statute of Frauds, the American reader will find much that will interest and inform him. The important subject of guaranty of bills and notes is ignored by Mr. De Colyar ; and he gives little or no attention to the attempted suretyship of a married woman, or to the class of guaranties lately becoming known as "Guarantee Insurance," *sub nom.*, which last subject would seem to be immediately suggested by the English statute of 1867, known as the "Guarantee by Companies Act," to which the author makes especial reference.

Mr. De Colyar discusses elaborately the questions arising under the Statute of Frauds, and quotes largely from Throop, on the validity of verbal agreements, and other American works, still, however, confining himself to an illustration of the English law.

By confining his treatise within its present limits, the author has failed to make the most of his opportunity, and we are debarred from awarding to his work the highest position as a text-book, though we believe such rank would be conferred by the profession upon a more elaborate and complete treatise written in the same style.

Mr. Morgan, disavowing any pretence of presenting all the American cases, has added to Mr. De Colyar's text and his 900 English cases, references, mostly in the form of mere notes, to 1,200 American cases upon the subject treated of. We can not find fault with the American editor for claiming too much for his work, as it is avowedly unpretentious ; but we can not overlook the fact that he has forced his American edition into print with undue haste. The opportunity might well have been improved to supplement Mr. De Colyar's treatise with chapters on the peculiarly American topics of suretyship on bonds in judicial proceedings (other than official bonds), and the rights of sureties to summary judgments against their principals ; and these, with chapters on the Guaranty of Bills and Notes (to which Mr. Morgan gives about two pages of notes), and on "Guarantee Insurance," and a further extension of the



upon him some decision which has been here omitted. But at the same time this plan has drawn into Mr. Lacey's book a great many decisions which have no other connection with railway law than arises from the mere fact that a railway company was a party to the litigation. A great many extrinsic matters, and many titles even, which might otherwise have been omitted, have thus been introduced into his book, and by this means its size has been very materially, and, we can not avoid thinking, unnecessarily increased. Thus we find decisions on almost every title usually met with in other digests; such as Abatement, Administration, Admiralty, Agency, Agreed Cases, Amendments, Appeals, Arbitration, Arrest, Arrest of Judgment, Assignment, Assignment for the Benefit of Creditors, Attachment, Attorneys, Audita Querela, Bill and Notes, Bill of Discovery, Bill of Exceptions, Certiorari, Champerty, Change of Venue, Executors de son Tort, Guardian and Ward, Habeas Corpus, Husband and Wife, Illegitimate Children, Insanity, Murder, Pleading, Process, Slaves, etc. It should not be supposed, however, that all these titles could be eliminated from a work embracing the subjects which would be looked for in a digest covering the indefinite field of "railway law." Properly speaking, there is no such thing as railway law. The various elements which compose the body of case law are not logically capable of such a sub-division. Thus, there are few incidents pertaining to railway corporations which do not attach to other private corporations. The obligations of railway companies as carriers of passengers and goods are not essentially different from the obligations of other public carriers. The rules applicable to injuries occasioned by the negligence of railway companies are not essentially different from the rules applicable to negligence by other persons. "Railway law," then, consists chiefly in the application of principles of law, which obtain elsewhere, to new situations; that is, to the organization of railway companies, the construction and management of railways, and the various rights and obligations thence arising. The boundary lines of railway law are therefore traced around a certain number of adjudications which apply in the concrete to the subject of railways, but do not separate from the general body of the law any distinct class of legal principles.

These observations are thrown out for the purpose of indicating the difficulties which would have attended any attempt on the part of Mr. Lacey to eliminate from his book, matters which do not

seem to be at all peculiar to railways and railway companies. But whilst this would have been attended with some difficulty, we should have been quite willing, knowing, as we do, Mr. Lacey's excellent judgment and habits of attentive discrimination, to trust him to reject a considerable amount of matter which is clearly *surplusage*. Thus, difficult as it may be in many cases to tell what should or what should not be included in such a volume as this, it is evident that such questions as,—when an action shall abate (p. 9); when a bill will lie to quiet title (p. 10); upon whom lies the *onus* when the authority of an administrator is denied (p. 10); what constitutes adverse possession (p. 11); whether an agent can submit the cause of his principal to arbitration (p. 23); when a person may be arrested under civil process in Kentucky and in New York (p. 26); the form and effect of an assignment for the benefit of creditors (p. 27); procedure under the attachment laws of various states (pp. 29, 30); the powers, duties and compensation of attorneys (pp. 30-32); whether payment in confederate money is a good payment (pp. 128, 129); whether a constable may serve process before he has given bond (p. 136); whether a court is legally constituted which meets on Wednesday, instead of Monday, the day fixed by law for the commencement of the term (p. 169); when a person is estopped from pleading that he was an *executor de son tort* (p. 294); jurisdiction of the federal courts (pp. 296, 297); various questions pertaining to the law of fire, life, accident and marine insurance (pp. 480-482); questions relating to the law of interest (p. 482); of judgments (p. 484); of appeals from judgments of justices of the peace (pp. 494, 495); when contracts to pay money are dischargeable in greenbacks, and when in gold (p. 505); how marriage may be proved in Pennsylvania (p. 519); whether it is murder or manslaughter for a thief, who has broken into a railway ticket office with intent to steal therein, to kill an officer who attempts to arrest him without warrant (p. 547); under what circumstances new trials will be granted or refused (pp. 552-555); when non-suits will be ordered (p. 555); whether a notary public may take the acknowledgement of a deed outside of the county in which he resides (p. 556); the location of the boundary line between New York and New Jersey (p. 621); and many other questions of a like nature—have no proper or logical place in a work of this character. We can not but regret that Mr. Lacey had not excluded these extraneous matters, and employed the space thus

saved in collating the English decisions on railway law—a plan which, we feel sure, would have made his book all that could be desired in a work of this character.

We have thus pointed out what we conceive to be an error in the plan of the work ; for we cannot call it a *defect*. Corresponding omissions would have been defects ; and Mr. Lacey has happily chosen to err on the right side. We will now proceed to state what we consider to be the merits of his book ; for it has clear and exceptional merits. In the first place, its enterprising publishers are to be congratulated for their share of the work. It is neatly printed on thick, firm, cream-white paper. Although it is nearly as large as the Revised Statutes of the United States, it lies open on one's table like a ledger, and it is a real pleasure to rest the eye upon its clean, white pages. Although we have succeeded in detecting one error (on page 58, where the case of Galena Packet Co. v. Rock Island Bridge Co., is quoted from 35 Howard's Practice Reports), yet in general the proof seems to have been carefully and cleanly read.

In subdividing his matter into convenient and appropriate titles (always a difficult and perplexing task), Mr. Lacey has shown excellent judgment ; and in his statements of legal doctrine, he appears to have been sufficiently concise without narrowing them down so much as to make them unintelligible. An idea of the magnitude of the work may be gained when it is stated that about 6,000 cases have been digested, as shown by the table at the end of the volume. When we contemplate this vast array of American railway cases (enough to make sixty volumes of reports) we can well credit the author's statement that none have been omitted. Turning to the text of the book, we find the larger part of these cases distributed among such suggestive titles as Bills of Lading, Bridges, Carriage of Live Stock, Carriage of Merchandise, Charter, Connecting Lines, Consolidation, Construction of Railways, Contracts, Conveyance, Damages, Depot, Directors, Dissolution, Ejectment, Elevators, Eminent Domain, Fires, (meaning fires occasioned by operating railways ; a great number of cases are presented under this title), Highway, Injunction, Injuries to Domestic Animals (40 pages), Injuries to Employes (20 pages), Injuries to Passengers (40 pages), Injuries to Persons Generally, Injuries to Persons on the Track (30 pages), Injuries to Teams and other Property, Land Grants, Lateral Rail-

roads, Lease, Limitations, Location, Mandamus, Mortgage (meaning railway mortgages, 23 pages), Municipal Corporations, Negligence, Obstructing Railway Track, Officers, Official Bonds, (referring to railway officials), Rates, Right of Way, Route, Sales, State Railways, Station Grounds and Buildings, Stock and Stockholders, Streets, Street Railways (15 pages), Sub-Contractor, Subscription by Cities and Towns, (14 pages), Subscription by Counties (15 pages), Subscription by Individuals (40 pages), Subscription by States, Subscription by Townships, Taxation (20 pages), Ticket Agent, Tickets, Time, Time-Table, Transfer of Corporate Property, Treasurer, Trespass, Warehousemen, and many others.

In addition to the great number of titles under which matter is placed, Mr. Lacey has added greatly to the convenience of those who may consult his book, by scattering through it a great number of other titles with cross references. We take pleasure in specially commending this excellent feature; since many digest-makers sin grievously by omitting it. It would really seem as though the ingenuity of Mr. Lacey had omitted no title under which the crudest blunderer might be expected to look for decisions on any question pertaining to railway law. To give examples of this, we may cite the following titles from which references are made to other titles which contain matter on the subjects to which they relate: Assault and Battery, Assessments, Assignment, Brakemen, Branch Railways, Carriers, Change of Cars, Chattel Mortgage, Cities, Coal, Collisions, Colored Persons, Commons, Comparative Negligence, Condemnation of Lands, Construction of Statutes, Contempt, Cotton, County, Coupons, Criminal Law, Crops, Crossings, Custom, Deaf Persons, Death, Decree, Deed of Trust, Defective Machinery, Delays, Demand, Demurrer, Depot Grounds, Dividends, Double Track, Draw Bridge, Drunkenness, Elections, Elevated Railway, and so on through the remaining letters of the alphabet. But Mr. Lacey has gone further, and, in order that nothing might be wanting which could facilitate rapid and accurate search, he has added what appears to be a very full and excellent index, embracing nearly forty pages of matter. He has also had the diligence to append, in addition to the general list of cases digested, a table of some 300 cases which have been overruled, denied, doubted, reversed, etc.

On the whole, we know not whether most to commend the author, who in the midst of an active and exacting practice, could

have the patience to complete in so thorough a manner a task of such magnitude, or the publishers whose good taste has given us a volume of such beauty and mechanical excellence.

## Notes.

**RUFUS CHOATE'S ADVICE TO A YOUNG LAWYER.**—Twenty years ago Rufus Choate wrote to Col. J. D. Waddell of Georgia, an autograph letter of which the following is a copy:

BOSTON, January 26, 1855.

J. D. WADDELL, CEDARTOWN, GA.:

DEAR SIR:—I hope you will do me the justice to believe that I have intended long since to acknowledge your letter, but that a succession of cares, some ill-health, and some absences, have hindered me, until any reply will seem, I am afraid, ungraceful and unwelcome. If even now, however, I can convey a single useful suggestion, I shall the less regret the delay.

I take it for granted that in regard of strictly professional studies you do not mean to solicit any hint. In our profession we are nothing if we are not first and thoroughly lawyers—and to become such there is but one way. Such a course as Hoffman's—with some changes of *particular books*—extended and distributed over ten years of labor at the rate of at least three hours a day, over and above all that you read for your current business—will set you very high in this indispensable attainment—the knowledge of our science.

But I suppose you were thinking rather of subsidiary pursuits and accomplishments. I would unite, then, with the thorough mastery of the American law proper, which you are to practice, as much of the civil law as possible. This it was which gave Legare so much fullness and so much elegance of matter. The civilians are subtle, copious and exact. You of course know where all that learning is to be found—but I would look, too, into the *casuists*—for analysis; for ethical distinctions; for the direction of the head and heart. *Suarez de Legibus et de Legislatione* is a good book and represents a class. He is a Jesuit, you know.

But the great problem is, after all, how to give to your legal attainments their utmost power of impression on others; on the bench, the bar, the community, *the time*. And this conducts you at once into the circle of elegant, various, yet kindred acquisition and accomplishment. In my judgment the very first book to read and thoroughly digest is Quintilian. See there, how *the most splendid of legal rhetoricians*, the lights of the Roman bar—were trained in their marvelous perfection in the practice of forensic debate. I would translate him—a page or two a day—understand him perfectly—and apply all his weighty and mature counsels—apply by adapting them to the altered circumstances of our time. He who masters him knows how to become the most finished of the pro-

fession of the law. And Aristotle and Cicero—day and night. Add of the moderns, Bacon, Burke, and then all the English fine writers of prose and verse.

You get your idea of the fine legal orator, then, from Quintilian and Cicero and Aristotle. But to realize it in yourself, the indispensable studies are ethics, in which I include the Publicists, Grotius, Puffendorf, etc.—as well as the various moral treatises, and history. All knowledge will help, but these are nearest. History you must know, to understand the sources and the causes and spirit of laws; ethics to enrich and guide your reasonings on facts and your judgment of actions and of character. McIntosh, Smith, Jeremy Taylor—in cases of conscience—Cicero, Whewell, Rush—in this kind.

Nothing will set your fortunes earlier, and if your legal and general studies are faithful, nothing will mark you more conspicuously and brilliantly than a rich, select, and copious English style. This, with his emotional natural and eloquent feeling, placed Erskine at the head of the bar of England in an hour and forever. This, more than anything else, always excepting his prodigious learning and power of logic, made the spell of Pinckney's orations. *The tendencies* of the bar, are to a cheap, extemporaneous impoverished *gabble*. To counteract this, *resolve* to be master of our mother tongue. This will cost you a lifetime, and it is worth it. *Write every day*; if too exhausted for original composition, *translate*—say from Demosthenes, Cicero, Tacitus, Seneca, Pascal—selecting the choicest, most lively, and most energetic expression. Burke, Dryden, Johnson, Shakspeare, Jeremy Taylor, Spencer—have all the words. Never, under any circumstances, sleep without having read *for the language* one page in a great author. It will lift up your spirit, dilate your conceptions, insensibly warm and color your vocabulary. *Fluency* is not the thing. Rich and weighty speech is *power*.

But I have run through my letter, and wishing you the loftiest success,

I am your servant and friend,

—*Atlanta Herald*.

RUFUS CHOATE.

LORD ST. LEONARDS.—On the 29th day of January last, Edward Burtenshaw Sugden, Lord St. Leonards, died at his estate in Sussex, at the advanced age of ninety-four. As he was a great lawyer—perhaps the greatest equity lawyer of his generation—and is familiarly known through his writings on this side of the Atlantic, it may not be inappropriate to subjoin a brief sketch of his life, which we find in the *Canada Law Journal*:

On the 29th of January last died Edward Sugden, Lord St. Leonards, a name which ranks with Coke and Blackstone, as that of a writer upon the laws of England of no ephemeral fame. He had reached the great age of 94 years, and it has been said of him, what can be said of

no other lawyer living or dead, that he has been appealed to as a living oracle of the law for 70 years. In the roll of the Chief Justices and Chancellors of England will be found in about equal numbers, men of the highest and lowliest birth. Lord St. Leonards belonged to the latter class, and like Abbott, Lord Tenterden, was the son of a barber. He is said to have been born in his father's shop in London, on the 12th of February, 1781. It is related of Lord Chief Justice Tenterden, that on his last visit to Canterbury, his native place, he pointed out to his son a little booth or stall opposite the western front of the cathedral, saying "Charles, you see this little shop! I have brought you here on purpose to show it you. In that shop your grandfather used to shave for a penny. That is the proudest reflection of my life! While you live never forget that, my dear Charles." A story is told of Lord St. Leonards which exhibits him in an equally pleasing light. He was addressing a crowd of electors once from the hustings, when one of his hearers taunted him with his origin. "It is true, I am a barber's son," he retorted, "and I am proud to own it. If you had been a barber's son, you would have been a barber yourself."

The history of young Sugden's early life is not well authenticated, but it is clear that he was set to earn his bread in no very dignified capacity. He was employed as an errand boy in the office of Mr. Groom, a conveyancer in Cavendish Square, London. The story goes that Mr. Groom was in the habit of consulting Mr. Butler, the learned editor of "Fearn's Contingent Remainders" and "Coke upon Littleton." Butler happened one day to be in Mr. Groom's office, when he was bantered by Mr. Groom about a supposed error in one of his books, which the conveyancer said had been discovered by his office boy. Butler insisted on having the office boy into the room, and Sugden made his appearance. The error into which the great author had fallen is said to have been so clearly pointed out by the office boy that the author gave way, admitted he was wrong, and became his critic's firm friend. Butler went to Sugden's father and represented that the boy was meant for greater things than running errands and cleaning ink-bottles, and Sugden was eventually entered a student of Lincoln's Inn.

Owing to the curious and antiquated custom of unseating the Lord Chancellor with his defeated government, Lord St. Leonard's fame rests chiefly upon authorship, and not upon judicial decisions. He was hardly twenty-one years old when he made his first adventure in legal literature with a little work entitled, "A brief Conversation with a Gentleman of Landed Property about to buy or sell land." This unpretending work at once gave him a reputation, and met with so much encouragement that three years later, in 1805, he published his celebrated Treatise on the Laws of Vendors and Purchasers, which has gone through fourteen editions, and will always be the standard text book on the subject.



In 1807, Mr. Sugden was called to the bar, having been previously a conveyancer simply. He immediately stepped into an extensive practice, which increased rapidly. At one time his professional income is said to have reached, and perhaps exceeded £20,000 a year. His fame as a real property lawyer caused him to be retained in most important cases where questions of that description arose, and in the common law as well as in the equity courts. About 1822 he received his silk gown from Lord Eldon, who had the highest respect for his learning, and is said to have once consulted him privately on an abstruse question relating to "springing uses," and to have been guided by his view.

"His silk gown," says a writer in Blackwood's Magazine, to whom we are indebted for many of the facts in this notice—

"Was a splendid success, silencing all sneers and the whispers of disparagement in every quarter. His consummate knowledge of the principles and details alike of real property law and of conveyancing, and of equity, his rapidity of perception, his imperturbable coolness and self-possession, his conscientious devotion to the interests of his clients, the pith and brevity of his arguments, his lucid exposition of the most involved facts—these points all combined to invest his advocacy with such charms in the eyes of anxious solicitors and their clients, that retainers were soon showered down upon Mr. Sugden from every quarter, and it was almost a race between rival solicitors who should first retain him."

But the pressure of counsel business did not detract from Sugden's literary efforts. Before he had passed his 27th year, he had given to the public two new and enlarged editions of the "Vendors and Purchasers," and had written an entirely new work, the celebrated "Treatise on Powers," which is regarded "as one of the most remarkable performances on record in the literature of the law." This was followed in close succession by other works on legal subjects, some of an extensive and others of a minor character.

Mr. Sugden was, in politics, a Tory, and in 1828 was elected in the interest of that party, for the constituency of Weymouth and Melcombe Regis, and was soon after made Solicitor-General in the Duke of Wellington's administration. This, however, he did not long enjoy, for he was compelled to retire with his colleagues in 1830, when Earl Gray and the Reformers came into power. Sir Edward Sugden then resumed his practice at the bar, and had the pleasure of pleading before Brougham, the new chancellor, with whom, according to general belief, he was on anything but amiable terms. The caustic comment of Sugden upon the chancellor's capacity for his office, is well-known. "If the chancellor knew only a little of law, he would know a little of everything." A good deal has been said about the relations between Lord Brougham and Sugden. Lord Campbell, in those "Lives," which added a new terror to death, dwelt upon the matter with such spitefulness as to

call forth from Sugden the *brochure* known as "Lord St. Leonard's Defence." In a much canvassed book lately published, which probably embraces as much malice and scandal as any book of its size yet written, the "Greville Memoirs," the hostility between Brougham and Sugden is accounted for by reasons hitherto, we believe, unknown. We will let the accomplished gossip tell his own story.

"Lamarchant told me that the cause of Sugden's inveterate animosity against Brougham, was this: that in a debate in the House of Commons, Sugden in his speech took occasion to refer to Mr. Fox, and said that he had no great respect for his authority, on which Brougham merely said, loud enough to be heard all over the house, and in that peculiar tone that strikes like a dagger, "Poor Fox." The word, the tone, were electrical; everybody burst into roars of laughter; Sugden was so overwhelmed that he said afterwards that it was with difficulty he could go on, and he vowed that he never could forgive this sarcasm."

At this time, Sir Edward Sugden, with professional and parliamentary duties combined, seems to have been in the habit of accomplishing an amount of work which was simply tremendous. On one occasion, the evening before a "motion day," he read and mastered the contents of 30 briefs between his dinner and 11 P. M., and then, instead of going to bed, called a hackney coach and drove to the House of Commons.

In 1834, on the return of the Tories to power, Sugden was made Lord Chancellor of Ireland, an office which he held for three months, just long enough to make his rare powers as a judge manifest, and to cause his return for another too brief period, in 1841, to be hailed with acclamation. In 1852 he was appointed by Lord Derby, Lord Chancellor of England, with the customary peerage.

"He speedily showed both the bar and the public that he justified the appointment, and something more than justified it. In the first appeal case which came before him in the House of Lords—that of *Rhodes v. De Beauvoir*—a most intricate case, depending on the construction of a singular and most obscurely worded will, when the counsel expected that he would ask for the papers and take time to consider, he delivered, off-hand and without notes, a most elaborate and luminous judgment, which occupies nearly 20 pages in the printed reports. And this he did repeatedly as by intuition, so familiar had he grown with every possible complication that had arisen, or could arise, in all questions as to the ownership or transfer of real property."

Since the close of 1852, he never again held the Great Seal of England, although the opportunity was again offered him in his 77th year. That offer was declined, but not through love of ease, for from that time till the very end of his long and laborious life, Lord St. Leonards kept himself busily employed in work of different descriptions. He read and noted every reported case in all the courts and recorded them in the margin of his works, so that, it is said, his executors could send a new

edition to the press to-morrow without revision. He wrote his "Handy Book of the Law of Real Property" since his retirement from office. His attendance in the House of Lords as a Law Lord was unremitting. He allowed no legal measure to pass the house uncriticised. For instance, when Lord Hatherley, in 1869, introduced his Judicature Bills, Lord St. Leonards, though close upon 90 years of age, put forth a clear and lucid criticism upon those measures.

**TESTIMONY OF ATHEISTS.**—The question of the competency of an atheist to give evidence was raised by the sitting magistrate last Monday at the Westminster Police Court. The question is doubtless one which has given rise to many opinions, judicial and otherwise, but which we considered had at length been determinately settled. The theory of the law as shown in the celebrated case of *Omychund v. Barker* (1 Atk. 21), and other subsequent decisions, has been based on the assumption that a witness is required to take a certain form of oath, importing a belief in the existence of a God, or Supreme Being, but that if a person have no such belief, an oath could not be administered unto him. In consequence of the religious belief of the Society of Friends and of the Moravians, statutes have been passed to abolish the necessity of an oath, and to substitute a formal affirmation or declaration for such people, who, from conscientious motives, are unwilling to take an oath. The Common Law Procedure Act 1854, s. 20, next applied the same alternative in civil cases to any person whomsoever who might object to an oath from matters of conscience, and the 24 & 25 Vict., c. 66, extended the same boon to criminal cases also. But it will be observed that these enactments alone apply to persons who, from a religious feeling, refuse to comply with a religious form, and not to those who are destitute of all religious belief. The first legislative step in favor of the admission of such latter persons to give evidence, was the 6 & 7 Vict., c. 22, which permits members of the tribes of barbarous and uncivilized people in British colonies and plantations, persons described by the act as "destitute of the knowledge of God and of any religious belief," to give evidence without being sworn. This enactment, we regret to say, was found necessary to be extended to our own country by the provisions of the 32 & 33 Vict., c. 68, which in sect. 4 enacts that if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, "shall object to take an oath, or shall be objected to as incompetent to take an oath," such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration, viz.: "I solemnly promise and declare that the evidence given by me to the court, shall be the truth, the whole truth, and nothing but the truth." Such declaration has the same effect as an oath in subjecting the person, who

may make the declaration, to all the penalties attached to perjury, in case he should afterwards make any material statement untrue, or give any false evidence. Although to the Christian mind a natural antipathy may present itself as to what belief and credit should be accorded to atheists, it is certain that it is in the interests of justice, and for the benefit of the community, that such persons should be able to give evidence. It is no improbability to suppose the escape of a murderer from justice because the only person who can supply a necessary, but missing link, chances to be an atheist; and, although in the United States, where such evidence has long been receivable, the testimony of an atheist is, as a rule, subject to comments of discredit because he is an atheist, yet it is quite possible for an atheist to speak the truth, and, moreover, to be a person on whom implicit reliance may be placed, for, as Lord Bacon remarks, "atheism leaves man to sense, to philosophy, to natural piety, to laws, to reputation, all which may be guides to an outward and moral virtue, though religion were not." *Essay on Superstition*. And Bentham observes, on the same subject, that "the rebel to religion may still bear allegiance to the laws of honor, to those laws to which every thinking man, in proportion as he deserves that title, will ever pay obedience." Having regard to 32 & 33 Vict., c. 68, we have no hesitation in expressing our opinion that the magistrate, although actuated, we are sure, by the very best intentions, improperly excluded the evidence of the atheist in the case before him.—*The Law Times*.

**A CURIOSITY.**—The following remarkable judgment was delivered by the Supreme Court of Kansas, during the cholera season of 1866, in the case of *Searle v. Adams*, 3 Kansas, 515. It had been stated that this opinion was printed and distributed among the members of the Republican convention which met to nominate a successor to Chief Justice Crozier, and that it prevented his renomination. We do not vouch for this statement, however. At all events the learned judge seems, like the statute of limitations, to have been "irrepressible;" for he was appointed by Governor Osborne, United States senator, in place of Caldwell, and is still understood to be in the way of several aspirants for political preferment:

By the court, CROZIER, C. J.

In this case the irrepressible statute of limitations is again presented for consideration. For some years past, upon the disposition of each succeeding case involving a construction of this statute, it was considered by bench and bar that fiction itself could scarcely conceive of a new question to arise thereunder, but as term after term rolls around, there are presented new questions comparing favorably, in point of numbers, with Falstaff's men in Buckram, thus adding to the legions that have gone before, a new demonstration of the propriety and verity of the adage that "truth is stranger than fiction." With the heat of 98

degrees of fahrenheit, in the shade, and the newspapers teeming with reports of the ravages of our great common enemy, who, the more effectually to accomplish his double purpose of capturing the imprudent and frightening the timid, has assumed the form of the Asiatic monster, it might be supposed by the unthinking that the consideration of such questions would be entered upon rather reluctantly. But we beg to disabuse the public mind of any such heresy. Cases might be imagined where "smashes" would not stimulate, nor "cobblers" quicken, nor "julips" invigorate; but a new question under our statute of limitations, in coolness and restoring power, so far exceeds any and all of these, that when one is presented, the "fine, auld Irish gentleman's" resurrection, under the circumstances detailed in the song, becomes as palpable a reality as the "Topeka constitution or the territorial capital at Mineola." The powers of a galvanic battery upon the vital energies are wholly incomparable to it. So that the consideration of this case, upon this day of wilted collars and oily butter, should not entitle the court to many eulogies for extraordinary energy in the fulfillment of its duties.

In the case at bar, this court is asked to say, that upon the facts found by the judge of the district court, no judgment should have been rendered against Searle; and in making this request, counsel was understood to intimate that some mischievously disposed persons, with a diabolical intent, not clearly revealed, while organized as the legislature of the state, had made a violent and unwarrantable onslaught upon the constitution,—that constitution which this court, as a tri-pedal pier, is exerting its utmost endeavors to support,—that constitution which, not only from patriotic and moral, but from alimentary considerations as well, we are bound to maintain and defend. Judging from the argument of counsel, considered with reference to its length, earnestness and number of authorities cited, we did not know but that while we were sitting attentively listening to what was said in exposition of the attempt aforesaid, even then the constitutional fabric was toppling to its fall, and needed but an affirmance of the judgment of the court below to bring it down about our ears with a crash which should cause constitutional governments all over the world to quake upon their foundations, and inflict upon the body of constitutional liberty, contusions which must inevitably result in her speedy mortality.

Being in a somewhat "melting mood" to-day, we would be pleased to gratify counsel by adopting his fears, growing out of the supposed nefarious attempt of the legislature in the passage of the 19th section of the act, concerning the lost records of Douglas county, but supposing he will be somewhat gratified at a decision in his favor upon any ground, we proceed now to render such decision, asking to be excused from resolving ourselves into a state of excitement on account of the suppositious attack aforesaid, especially as we are not convinced that any such attack was contemplated or accomplished. The right of action accrued against

Searle on the 8th of July, 1858, and was barred July 8th, 1861, because no summons dated prior to that time was served upon him; the twenty-seventh section of the code, providing that an action shall be deemed commenced within the article on limitations, at the date of the summons which shall be served on each defendant. The summons issued March 23d, 1861, was not served upon Searle, and if an alias had been issued after July 8th, 1861, and before the destruction of the records in 1863, and served upon him, he might have successfully availed himself of the limitation provided. \* \* \*

It is as transparent as the soup of which Oliver Twist implored an additional supply, that the case at bar is not one of those as to which the general limitation was sought to be suspended by the section quoted; wherefore the district court erred in rendering the judgment against Searle.

**THE VACANT LOUISIANA JUDGESHIP.**—Judge Durell resigned the office of United States District Judge for the District of Louisiana, and his resignation was accepted, in December last, while Congress was in session. The President thereupon nominated D. A. Pardee, Esq., to the vacancy. This nomination was laid over by the senate until its extra session which was held after the adjournment of the forty-third Congress. The senate neither confirmed nor rejected the nomination, but laid it on the table, and then adjourned. Louisiana is thus left without a federal district judge, and one of the most important commercial cities of the Union is left without a court of admiralty and bankruptcy. Much important public and private business is pending in that court, and a large amount of funds is held by assignees in bankruptcy which can not be distributed without an order of the court. Great injury to public and private interests is thus threatened by the failure to fill the vacancy; and a question of pressing urgency is, can any remedy be devised before the meeting of the next Congress? The constitution of the United States (art. 2, § 2), provides: "The President shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions, which shall expire at the end of their next session." But this vacancy did not happen during a recess of the senate. It happened while the senate was in session; and that body with an apparent disregard of the public interests, failed to act upon the nomination of an incumbent to fill the vacancy which was sent to them. Under these circumstances the attorney-general is said to have advised the President that he had no power to make an *ad interim* appointment. It will be remembered that the question of the power of the President to make appointments in such cases, was brought before the country in a very forcible manner in 1866, by the appointment by President Johnson of Adjutant-General Thomas, as secretary of war *ad interim*, in the place of Secretary Stanton. This proceeding resulted in the passage of "The Tenure of Office

Act," 14 Stat. 439; Rev. Stat. U. S., p. 315, § 1769, by which it is provided as follows :

"The President is authorized to fill all vacancies which may happen during a recess of the senate, by reason of death or resignation or expiration of term of office, by granting commissions which shall expire at the end of their next session thereafter. And if no appointment, by and with the advice and consent of the senate, is made to an office so vacant, or temporarily filled during such next session of the senate, the office shall remain in obedience, without any salary, fees, or emoluments attached thereto, until it is filled by appointment thereto, by and with the advice and consent of the senate; and during such time all the powers and duties belonging to such office shall be exercised by such other officer as may by law exercise such powers and duties in case of a vacancy in such office."

There appears to be nothing in this provision which negatives the power of the President to fill the vacancies *existing* during a recess of the senate, if he possessed it before. Did the President, then, before the passage of this act, possess, under the constitution, the power to fill a vacancy in a case like the present? In Swartwout's case, it was ruled by the ablest of the attorneys-general, that he has. 1 Op. Attys. Gen. 631. In that case the commission of Swartwout as navy agent at New York expired during a session of the senate. The President nominated another person to fill the vacancy, but the nomination was not confirmed by the senate. This, then, was the case of a vacancy which arose during a session of the senate, but which, from the circumstance mentioned continued to exist during the recess. Mr. Attorney-General Wirt held that the President had power, under the constitution, to fill the vacancy by a commission to expire at the end of the next session of the senate. He reasoned that the words of the constitution "may happen during the recess," are equivalent in meaning to "may happen to exist during the recess;" and he adopted this as a construction not doing violence to the language of the constitution, and as the only one which would permit the spirit of the instrument to be carried out. He took the broad and apparently just view that "the President *alone* can not make a *permanent appointment* to those offices; that, to render the appointment permanent, it must receive the consent of the senate; but that, whensoever a vacancy shall exist which the public interests require immediately to be filled, and in filling which the advice and consent of the senate can not be immediately asked, because of their recess, the President shall have the power of filling it by appointment, to continue only until the senate shall have passed upon it; or, in the language of the constitution, 'until the next session.'"

The same doctrine was intimated by Mr. Attorney-General Taney, in Gwinn's case (2 Op. Attys. Gen. 525). Gwinn had been appointed by President Jackson, to the office of register of land titles in Mississippi,

during a recess of the senate, and the nomination having been afterwards made to the senate, was rejected by them. Afterwards, the President, receiving strong testimonials in his favor, re-nominated him. This nomination the senate laid on the table, as in the present case, and also laid on the table a resolution to inform the President, that the senate designed to take no further proceeding in the matter; and adjourned leaving the office unfilled. Mr. Taney, concurring in the opinion of Mr. Wirt, above cited, held that the President had power to fill the vacancy.

The same view was taken by Mr. Attorney-General Mason, in an opinion to the President in 1846, and it asserted that even though the vacancy occurred before the session of the senate, if that body, during its session, neglected to confirm a nomination to fill it; the President may fill it by temporary appointment. 4 Op. Attys. Gen. 523.

In an opinion of Mr. Attorney-General Legare to the secretary of war in 1841, this doctrine was pushed still further, and it was held that where a vacancy happened during a recess of the senate, and a session afterwards intervened without the vacancy being filled, the President had power, during the next recess of the senate, to fill the office by temporary commission. 3 Op. Attys. Gen. § 673. But the exercise of the power in these last two cases is now prohibited by section 3 of the Tenure of Office Act, *supra*.

It was, however, held by Mr. Legare in a previous case, that where vacancies are known to exist during a recess of the senate, *and nominations are not then made*, the President can not fill them during the subsequent recess. In other words, the President can not, by failing to make nominations while the senate is in session, acquire the power to fill the vacancies without the advice and consent of that body. 4 Opin. Attys. Gen. 361. But in the case of the collectorship of Alaska (12 Op. Attys. Gen. 455), Mr. Attorney-General Evarts overruled this doctrine, and advised the secretary of the treasury that where an office is created during a recess of the senate, and no nominations are made thereto, the office may be filled by executive appointment during the recess. This ruling was made in view of the third section of the Tenure of Office Act. It may be added that in each of the earlier cases above cited, the advice of the attorney-general appears to have been acted on by the President.

The power of the President to fill this vacancy being clear, according to the uniform holdings of the attorney-general, and the uniform practice of the Presidents before the passage of the Tenure of Office Act, it remains to enquire, has this power been changed by that act? The answer is, first, it has not been changed; secondly, if it had been attempted to be changed by the act, the act would in so far be unconstitutional and void; since it must necessarily be beyond the competency of Congress to curtail a power lodged in a co-ordinate branch of the government by the constitution. It will be seen that the first clause of section 3 of the



Tenure of Office Act, simply follows the language of the constitution. In the case of *The Collectorship of New Orleans* (12 Op. Attys. Gen. 449), Mr. Attorney-General Evarts held, that in thus adopting the language of the constitution, Congress employed the words in the same sense in which they had been accepted and acted upon by the executive branch of the government; and he held that the language embraces "all vacancies that from any casualty, happened to exist at a time when the senate can not be consulted as to filling them;" and that the predicament of "abeyance" under the second clause of the section, in its application to an office made vacant during a recess of the senate, and not filled at the expiration of that session by a full appointment, by and with the advice and consent of that body, can only arise at the expiration of its *next* session, without that body's having concurred in a full appointment to the office.

There would seem to be no doubt, then, of the President's power to fill the vacancy by temporary appointment in this case.

But should the President entertain a different view, the remaining enquiry is, can the circuit judge solve the difficulty by appointing one of the district judges of some other district to hold the court pending the vacancy? This enquiry is suggested by the fact that Mr. Circuit Judge Woods is understood to hold that he has such power. We find nothing in the revised statutes conferring it. Those statutes (§§ 591-596), contain provisions for the designation of a judge of another district, to perform the duties of a district judge in case of his *disability*, or in case of an *accumulation of business*; but the only provisions applicable to the case of a *vacancy* appear to be sections 602 and 603, which read as follows:

"§ 602. When the office of judge of any district court is vacant, all process, pleadings, and proceedings pending before such court, shall be continued of course until the next stated term after the appointment and qualification of his successor; except when such first-mentioned term is held as provided in the next section.

"§ 603. When the office of district judge is vacant in any district in a state containing two or more districts, the judge of the other, or of either of the other districts may hold the district court, or the circuit court, in case of the sickness or absence of the other judges thereof, in the district where the vacancy occurs, and discharge all the judicial duties of judge of such district, during such vacancy; and all the acts and proceedings in said courts, by or before such judge of an adjoining district, shall have the same effect and validity as if done by or before a judge appointed for such district."

It is seen that neither of these sections authorizes the designation of a district judge to hold a district court *in another state*, and that the last section can not apply to the case of Louisiana, which constitutes but one district.

Unless some serious mistake or oversight has been made in the examination of this question the view would seem unavoidable that relief can not come from any action within the competency of the circuit judge, but must come from the President through an *ad interim* appointment.

**HORSE KICKING MARE THROUGH BOUNDARY FENCE.**—The recent case of *Ellis v. The Loftus Iron Company* (31 L. T. Rep., N. S. 483), usefully illustrates the subject of remoteness of damages. It was an appeal from the County Court Judge of Glamorganshire. The plaintiff occupies a farm, a portion of which was let to the defendants. This portion was fenced in by the defendants by means of a wire fencing. On the adjoining land the plaintiff kept a number of horses and cattle. On the 18th of August the defendants turned an entire horse, which belonged to them, on to this plot of ground. This horse and one of the plaintiff's mares being on either side of the fence, the former damaged the latter by biting and kicking, and an action was consequently brought. The evidence proved that the horse did not cross the fence; but that the plaintiff had warned the defendants to keep the horse away from his mares. The county court judge held that there was no trespass, and that the damage was too remote. The court of common pleas reversed this judgment. The learned judges were mainly influenced in deciding the question of remoteness of damages by the case of *Lee v. Riley*, 18 C. B., N. S. 722. In that case, through a defect in the fences, which it was the defendant's duty to repair, his mare strayed in the night-time from his close into an adjoining field, and thence into a field of the plaintiff's, in which was a horse. From some unexplained cause the defendant's mare kicked the plaintiff's horse and broke his leg. It was held that the defendant was responsible for his mare's trespass, and that the damage was not too remote. "The only question," says Mr. Justice Montague Smith, "is whether or not the injury so caused was too remote. It was contended that it was, because the plaintiff gave no proof that the defendant's mare was vicious, and that the defendant knew it. I do not think it was wrong to give any such evidence. \* \* \* If even the plaintiff's horse committed the first assault, the plaintiff would, under the circumstances, I think, have been equally liable. It was through his negligence that the horse and the mare came together. The damage complained of was the result of that meeting, and I think it was not too remote." The decision of the court of common pleas seems at first sight to bear hard upon the Iron Company, but a moment's reflection will show that it is quite consistent with justice.—*The Law Times*.

[We may add to the above that one of the chief grounds on which the judges of Common Pleas rested their decision, was that the horse occu-

pied the position of a trespassing animal; that there are no degrees in trespass; and that *the horse having got his leg through the fence, and hence across the boundary line*, was trespassing on the plaintiff's close at the time the injury was committed.—Ed. So. L. R.]

A REHEARING.—A justice of the peace in Chicago, who is a convert to spiritualism, is, according to the Chicago Tribune, in the habit of having protracted conversations with Sir Edward Coke, Blackstone, and other authorities, and bringing their experience to bear on the cases before him. The other day, during the forenoon session of the court, a case came up for trial. The attorney for the defence quoted a decision which he found in one of the early Illinois reports. It was apparently decisive. The lawyer looked triumphantly at the judge. The latter said: "Wait a minute, I feel the influence." Then the judge grabbed a lead pencil and a sheet of paper. His hand went convulsively, and at the end of five minutes he had scribbled over the entire page. When he had finished he said to the lawyer: "I have just received a message from Judge Lockwood, who was one of the judges of the supreme court at the time this decision was rendered. He authorizes me to say that the majority of the members of the then court, who are now in the spirit land, after mature consideration, decided to reverse their former judgment. Please inform the profession of that fact, that they may govern themselves accordingly." The judge then continued: "Under the circumstances, you will see that I can pay no attention to the decision you have quoted, and judgment must be rendered against you." The lawyer remonstrated; and the judge finally agreed to postpone the case for one week, in order to give Judge Lockwood and his colleagues an opportunity to examine the matter again, and see if they are determined to reverse their former opinion. In the meantime, the lawyers of Chicago are meditating whether it will not be necessary for them to burn all their reports if judges in the spirit land are to be allowed to carry on the business of making decisions and of reversing those which they have made in this world.—*Pall Mall Gazette*.

HEAVY FEES.—It has been publicly announced that the fee paid to Serjeant Ballantine, upon his retainer to defend the Guicowar of Baroda, was 5,000 guineas, and that a "further scale of fees" not likely to be less than 5,000 guineas, but "depending somewhat on the time the Serjeant will be absent from England," has been also "arranged." Speculation has already fixed the period of absence from England at about three months. If this be correct, the *honorarium* is probably among the largest ever paid to counsel, and it furnishes a curious commentary on the superstition which, as Mr. Forsyth tells us (*Hortensius*, p. 410), has prevailed in every country where advocacy has been known, of

looking upon the exertions of the advocate as given gratuitously. It hardly needs, however, the example which he cites from Roman history, of the speedy relaxation of the decree of Augustus prohibiting advocates from taking fees, to show how rapidly the custom becomes more honored in the breach than in the observance. In our own country, except in the ecclesiastical courts (see Canon, 131), the rule has always been that a barrister has no legal right to a fee. "The reward," says Sir John Davys, "is a gift of such a nature, and given and taken upon such terms as albeit the able client may not neglect to give it without note of ingratitude, \* \* \* yet the worthy counsellor may not demand it without doing wrong to his reputation." A curious comparison of the fee-books of Dunning and Kenyon may be found in the life of the latter recently published by his great-grandson. It appears that the utmost amount realized by Lord Kenyon in one year, when he was attorney-general, was £11,038 11s., of which more than 3,000 guineas were made by opinions. The fee-book of Lord Eldon, when attorney-general, is given by Lord Campbell in his "Lives of the Chancellors," and the highest total for one year is put down as £12,140 15s. 8d. Erskine appears to have received £1,000 for the defence of Admiral Keppel, but that was after the acquittal. In our own time, two fortunate attorney-generals and a late leader of the parliamentary bar, are stated to have respectively received thirty thousand pounds in one year. But as far as we remember, although refreshers have often been very liberal in proportion to the retainers, no retainer, since the fee of four thousand guineas, marked on the brief of Serjeant Wilde, in *Small v. Atwood*, has at all approached in amount that given to Serjeant Ballantine.—*Solicitor's Journal*.

[Serjeant Ballantine was but partially successful in the defence of his client—the commission before which he was tried having disagreed.—ED. SO. L. R.]

**THE LEGAL ASPECTS OF THE TRIAL AND CRUCIFIXION OF CHRIST.**  
—The crucifixion of Christ is universally regarded among Christians as a cruel murder, perpetrated by the Jews under the pretence of a legal sentence, after a trial in which the law and its forms were grossly violated and disregarded. The Jews, however, to this day, maintain that, whatever were the merits of the case, the *trial* was regular according to law, and hence the sentence was legally just.

Within the last half-century this subject has been thoroughly discussed by eminent men learned in the law. Mr. Joseph Salvador, a learned Jew, in his great work entitled "History of the Institutions of Moses and the Hebrew People," gives a detailed account of the administration of justice among the Hebrews, and to that chapter he has subjoined an account of the "Trial and Condemnation of Jesus," and he expresses

his opinion that the trial, considered merely as a legal proceeding, was conformable to the Jewish laws then existing.

One of the most eminent lawyers at the French bar, M. Dupin, immediately called in question the correctness of Mr. Salvador's opinion, and entered upon an analysis of that portion of his work with a view to examine its soundness. The former had, many years before, in a little work published in 1815, taken the view that this great trial was illegal, and which, he observed, has been justly called "*the Passion or Suffering of our Savior, for he did in truth suffer and had not a trial.*"

M. Dupin had great respect for the talents of Mr. Salvador, and with a friendly spirit he entered upon his critical examination, which was conducted with an ability, learning, animation and interest that apparently left nothing to be desired. As an argument, his work is unanswerable—he has demolished that of his adversary.

The questions between them involve several distinct points of enquiry, namely, first, whether Christ was guilty of blasphemy; and secondly, whether his arraignment and trial were conducted in the ordinary forms of law; and still again, whether, admitting that as a mere man he had violated the law against blasphemy, he could legally be put to death for that cause; and if not, then whether he was justly condemned upon the new and supplemental accusation of treason or sedition, which was vehemently urged against him.

Mr. Salvador's introductory analysis of his chapter on the Administration of Justice among the Hebrews is highly instructive and interesting; and those persons who have not been accustomed to read the bible, with particular reference to the *Law*, will find many new and striking views of that portion of the Scriptures. They can not fail to be struck with the extraordinary care taken to secure by law the personal liberty and rights of the citizen; and in his chapter on the "Public Orators and Prophets," it is clearly proved that in no nation was the liberty of speech so unlimited as among the Hebrews.

It remained, however, for a great American scholar, lawyer and author to do the crowning work relating to this interesting subject. We have reference to Prof. Simon Greenleaf's celebrated work entitled "*The Testimony of the Evangelists examined by the Rules of Evidence administered in Courts of Justice,*" with an appendix containing a "*Review of the Trial of Jesus.*" This was first published about thirty-five years ago, and has recently been republished in New York. No clergyman of any denomination should attempt to preach an Easterday sermon without having first read this latter work. We think M. Dupin and Prof. Greenleaf established, by the clearest record evidence, that the trial and sentence of Christ was illegal, when viewed simply as the ordinary course of law against any accused person.—*N. Y. Daily Register.*

**ERSKINE AND CHOATE.**—In the course of an eloquent address on The

Trial by Jury, delivered by Hon. Charles S. May, at the recent commencement of the Law Department of the University of Michigan, the following parallel is drawn between the two greatest masters of forensic eloquence who have spoken in the English language—Erskine and Choate:

Into this arena of the trial by jury have stepped some of the brightest intellects of the world. In the brilliant constellation of advocates who, in the last hundred years, in England and America, have reflected the light and glory of their genius upon the forensic stage, I would place Erskine and Choate at the head. I do not forget Brougham, and Denman and O'Connell and the marvellous Curran on the other side of the ocean, nor Pinkney and Hoffman and Prentiss and Paul Brown and Brady on this side. But all these, and many more able and gifted men are fairly distanced to these two great and incomparable advocates, who must stand in their respective countries as the bright particular stars of the jury forum.

But although Erskine and Choate were almost equally great as jury lawyers, their lives and careers present a series of sharp and striking contrasts. Erskine, the scion of a noble Scotch family, with imperfect early education, and after years wasted in a most opposite and dissimilar pursuit, took up the law when weary and disgusted with the life of an army officer in time of peace. Choate, a New England farmer's son, came early to the bar, after full preparation and worthily crowned with academic and collegiate honors. Erskine never became a scholar and was never distinguished for learning in the law or wide reading of literature. Choate, in all his subsequent career, was a laborious student and undoubtedly ranked higher in legal and general learning than any other advocate of his time. In the work which these men did at the bar the same contrast is presented. It happened to Erskine to be employed in a remarkable succession of great state trials in which he became the advocate of the rights and liberty of the citizen against public despotism, and in giving the death-blow to the doctrine of constructive treason, and vindicating the right of free speech and a free press, he performed the noblest service to the law and the free constitution of the empire, and won unfading and immortal forensic honors. Choate, on the contrary, was never privileged to argue a single case of great public political importance, but was compelled to use his vast and varied powers in questions of mere private interest and dispute—a circumstance which in his last days he recalled with pathetic regret.

So in the splendid and unequalled gifts which each brought to the bar they were still dissimilar. Erskine, who commanded the higher power and the better art, spoke with singularly clear and felicitous language, in sentences short and rich with beauty and strong with logic, and not unworthy of the great models of English speech which he found and studied in Shakspeare, Milton and Burke. Choate, whose learning

was deeper and whose vocabulary was wider and ampler, spoke in sentences of remarkable length and resounding sweep and rhythm, and astonished all by the amazing affluence and gorgeousness of his diction. Both were men of high imagination, but while Choate was more poetical and subtle in his fancy, Erskine was more vivid, intense and practical. Choate dazzled and overwhelmed a jury; Erskine swept and mastered them. Choate more resembled Cicero, who was a rhetorician as well as an orator, while Erskine was more like Demosthenes, who was the greater master of true eloquence.

In their personal appearance and outward manner, also, these great advocates were widely different. Erskine was fresh and bouyant, full of vivacity and of a fine and engaging presence; Choate was angular and almost ungainly of form, of pale and haggard countenance, and with only the divine genius looking out from his deep and burning eyes to distinguish him from an ordinary man. Possibly this may account for the fact that Erskine was full of personal vanity, while Choate was singularly modest and unenvious.

But in the midst of these many contrasts one great and striking parallel stands out in their public careers. Each left the bar for a brief season for service in a legislative assembly, the one in the British House of Parliament and the other in the senate of the American Congress. Each wearied and failed in the new and uncongenial place; and stranger coincidence still,—each met and quailed before a great parliamentary leader; Erskine before the imperious orator and statesman, William Pitt, son of the great commoner of England, and Choate before another proud and arrogant parliamentary chieftain, Henry Clay, the great commoner of America.

Returning now to the bar and the courts after their legislative failures, the old contrast stands out again in their lives, even to the very close. Erskine went upon the chancellor's woolsack, for a brief period, and then retired at fifty-seven from the bar and the courts. Choate returned from the senate to the bar while yet in his early prime, and gave thereafter his best powers and most brilliant efforts to his profession. Erskine died at seventy-three, after a long, sad evening to his life, in which he missed the old excitement of the courts and found no compensation in the love of books, that sweet solace of cultivated old age. Choate broke down suddenly at sixty, while yet in full practice, his nerves shattered by the long contentions of the forum; dying prematurely, and missing what he had so longed to enjoy—a peaceful and restful evening to his stormy and laborious life, when he could forget the fiery encounters of the bar in the sweet studies and unfailing delights of the books he loved so well. And so in death the great advocates present their last sad contrast, as each missed the closing felicity of his life—the one in the living too long, the other in dying too soon.

**LIST OF LAW BOOKS PUBLISHED SINCE OUR OCTOBER NUMBER.**

- Abbott's National Digest. Vol 1.  
 American Railway Reports. Vol. 3.  
 Bankrupt Law with Amendment. Third Edition. Cloth and paper.  
 Bankrupt Register. Vol. 10 (1874).  
 Benjamin on Sales. Amer. Edition.  
 Blackwell on Tax Titles. Fourth Edition.  
 Bump on Bankruptcy. Seventh Edition.  
 Byles on Bills. Sixth Edition.  
 California Digest. Vol. 3.  
 Connecticut Statutes. Revision 1875.  
 Central Law Journal. Vol. 1. Bound.  
 De Colyar on Guaranty, Principal and Suretyship.  
 Flanders on Fire Insurance. Second Edition.  
 Freeman on Cotenancy and Partition.  
     "    "    Law of Judgments. Second Edition.  
 Green's Criminal Reports. Vol. 1.  
 High on Extraordinary Legal Remedies.  
 Hilliard on the Law of Injunctions. Third Edition.  
     "    "    "    "    Torts. Fourth Edition.  
 Lacey's Digest of Railway Reports.  
 McClellan's Probate Law and Practice. (N. Y.)  
 Oregon Statutes. Revision of the Laws of. 1843—1872.  
 Perry on Trusts and Trustees. Second Edition. 2 vols.  
 Redfield's American Cases on the Law of Wills.  
 Roe's U. S. Commissioners' Manual.  
 Roscoe's Criminal Evidence. Seventh Edition.  
 Sedgwick on Constitutional and Statutory Law. Second Edition.  
 Sedgwick on the Measure of Damages. Sixth Edition.  
 U. S. Digest. First Series. Vol. 4.  
 U. S. Digest. New Series. Vol. 4. (1873.)  
 U. S. Statutes at Large. Revision of 1875.  
 Wharton on the Law of Negligence.  
 Wisconsin Digest. (Simmons.) Vol. 2.  
 For a full list of the late volumes of the state and federal reports, see  
*The Library Docket*, for April.



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## Original Articles.

### *I. CONSTITUTIONALITY OF THE CIVIL RIGHTS LAW.*

The Civil Rights Bill which recently passed the United States Congress, and received the approval of the President, may or may not in its immediate application be attended with consequences of the slightest importance, for the obvious reason that there existed no necessity for such a law. The white citizen did nothing to induce its passage; the colored citizen did not require it, nor even feel that he stood in necessity of such a measure. That such a law can be practically enforced no intelligent person of either race or color believes. The effort to enforce it will be but rarely if ever made, because such a law was not called into existence by the demands of any necessity on the part of those for whom it was ostensibly considered a benefit. We think the most prominent feature of danger to the Republic in the passage of the law under consideration, is its violation of the constitution.

There are two classes of laws which are equally unconstitutional: those in direct violation of some expressed provision of the constitution, and those which violate its spirit and purpose. We think it obvious that the Civil Rights Bill not only violates the constitution in word and deed, but more violently

infringes upon its principles; upon those principles which course along through nearly every article and clause, giving it vitality, like the life-blood that flows through the veins and arteries of the human system. The constant effort to undermine the constitution by the infusion of those acts violative of its principles, is more dangerous than a direct positive enactment which strikes at some known and acknowledged right.

Such violations are either self-corrective, or may be directly reached by the courts as well as by a correct and honest public opinion. A broken limb of the physical body may be mended, but an insidious poison may be infused through the system, planting the seeds of death, before its effects can be relieved by the curative art. So it is, philosophically as well as practically, with the body politic.

In speaking of the infractions of the constitution, Mr. Justice Story said, "The government can claim no powers which are not granted to it by the constitution." \* Again Chief Justice Marshall has said, "The intention of the instrument must prevail." † The suggestions from these two quotations present us a theme for discussion which we propose to examine in relation to the constitutionality of the Civil Rights Bill.

Take the following section: "Section 1. *Be it enacted etc.*, That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." ‡ Is not the above quoted section of the Civil Rights Bill plainly restrictive upon the citizens of the states by the exercise of

\**Martin v. Hunter's Lessee*, 1 Wheaton, 326.

†*Ogden v. Saunders*, 12 Wheaton, 332.

‡Amendments to the Constitution, Article X.

powers "not delegated to the United States by the constitution?" The right of controlling and managing the use of private property in the occupancy of the citizen belongs to the states, not to the United States government.

The constitution of the United States is a body of delegated and enumerated powers. "The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people."\* Can it be denied that the clause in the Civil Rights Bill does deny to the people of the states those rights which from the beginning of the government have been exercised by the legislatures of the states, under the acknowledged principles of law? Nor can it be claimed that this municipal power has been delegated to the United States government. The entire history of American legislation in state and federal governments shows that the principles of the Civil Rights Bill are not only unconstitutional, but a violent innovation upon the constitutional rights of the States.

Then follows the second section, prescribing the penalties for violating the law, and holding the citizen of a state amenable to the federal tribunals for exercising rights guaranteed to him by the recognized principles of jurisprudence, which under state and federal legislation had, according to the constitution of the United States, always belonged to the states: "Sec. 2. That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of any race or color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offence, forfeit and pay the sum of five hundred dollars to every person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in a sum not less than \$500, nor more than \$1,000, or shall be imprisoned not less than thirty days, nor more than one year:

\*Amendments to the Constitution, Article IX.

*provided*, that all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by state statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this *proviso* shall not apply to criminal proceedings, either under this act or the criminal law of any state; and provided further, that a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively." This section, like the preceding one, transcends the boundaries of authority fixed by the solemn covenant of the constitution, between the powers of the state and federal governments. To break down these boundaries is the most dangerous assault upon the principles of the constitution, the broken fragments of which will be the paving stones along the pathway of the monarch to the very doors of the temple of despotism. Under this bill, the police regulations of the state, never before refused to the states, have been transferred to the legislative halls of the national government.

We are now raising the standard of free government, and quote the language of one of America's greatest jurists, Rufus Choate, when speaking in relation to the jurisdiction of the states: "It is certain that in the American theory, the free theory of government, it is the right of the people, at any moment of its representation in the *state legislature*, to make laws, and, by its representatives in convention, to make the constitution anew." It is too plain for discussion, that when the constitution of the United States was adopted, the states were exercising the right to pass laws for the regulation of the uses of property, that the rights of property were guaranteed by state laws, and the protection of the citizen in his personal rights was guaranteed by the power of the state. This right can not, under the present constitution, with all its amendments, be taken from the states. The effort to do so is unconstitutional, and the first case that comes before the United States Supreme Court will test the question whether the state or federal government can prescribe the law for the tenure of the citizen of the state to his property; whether a mere tavern

broil, in which the landlord may be a party to protect his rights and the rights of his guests, is amenable to the law of his state or of the federal government; or whether a cabman along the streets, for a street broil as to who shall or shall not ride in the cab he is driving, will be taken before the mayor of the town and fined a few dollars under the police regulations thereof, or be placed formally upon trial, for fine or imprisonment, and finally be brought before the august tribunal of the United States Supreme Court, for an offence now fully reached by the mayor's court of the humblest incorporated town in the United States.

The Civil Rights Bill is unconstitutional, because it invades the rights of the state in the exercise of its police power. It seeks to punish the citizen of the state for the violation of no law against his state government, but for the violation of a law creating an offence against the United States, when no authority from the constitution permits Congress to create such offence. The offence under the Civil Rights Bill being of that character which belongs to the state government, may be illustrated by an extract from the opinion of Chief Justice Marshall in the case of *Gibbons v. Ogden*. Speaking of certain inspection laws passed by the states, he said: "They form a portion of that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government, all which can be most advantageously administered by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries etc., are component parts of this mass. No direct general power over these objects is granted to Congress, and consequently they remain subject to state legislation."\*

The exclusive authority of state legislation over this subject is forcibly maintained in the case of *The City of New York v. Miln*,† and *The United States v. DeWitt*,‡ in the latter case it being decided expressly that the United States has no po-

\*9 Wheaton, 203. †11 Peters, 102. ‡9 Wallace, 41.

lice power in the states. In this case an act of Congress which undertook, as a part of the revenue laws to make it a misdemeanor to mix for sale naphtha and illuminating oils, or to sell oil of petroleum inflammable at less than a prescribed temperature, was held to be void, because as a police regulation the power to make such a law belonged to the states and not to Congress.

This principle is fully endorsed by the Supreme Court of the United States in a later case, known as the Slaughter House cases.\* This case also decides the question of the constitutional authority of Congress to legislate on the right of the citizen of the state to manage and control his property in obedience to the laws of the states; on which point the court held that the Parliament of Great Britain and the state legislatures of this country have always exercised the power of granting exclusive rights when they were necessary and proper to effectuate a purpose which had in view the public good, and the power here exercised is of that class, and has until now, never been denied. Such power is not forbidden by the thirteenth article of amendment and by the first section of the fourteenth article.†

Even under the enlarged power granted to Congress by the late amendments, the authority claimed by Congress in the recent Civil Rights Bill is denied by the able and learned opinion of the court in the above cited cases, from which we make the following citation: "The adoption of the first eleven amendments to the constitution soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the federal power, and it can not be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the state organizations to combine and concentrate all the powers of the state and of contiguous states for a determined resistance to the general government. Unquestionably this has given great force to the argument, and added largely

\*16 Wallace, 36.

†2d and 3d head notes, Slaughter House cases.



to the number of those who believe in the necessity of a strong national government. But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the states with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the states, and to confer additional power on that of the Nation.”\*

It is impossible to sustain the constitutionality of the Civil Rights Bill under the clause of the fourteenth amendment, that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” The Supreme Court of the United States, in the Slaughter House cases, has interpreted with clearness, force and accuracy, the principles of national jurisdiction established by this constitutional limitation. The United States can not interfere unless there is a denial by the state of equal protection of the laws to all citizens. The Supreme Court, in the case cited above, quoting from the XIVth amendment the words, “nor shall any state deny to any person within its jurisdiction the equal protection of the laws,” says: “In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is difficult to give a meaning to this clause. The existence of laws in the state where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.”† But, “if, however, the states did not conform their

\* 16 Wallace, 82.      † 16 Wallace, 81.

laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. *But as it is a state that is to be dealt with, and not alone the validity of its laws,* we may safely leave that matter until Congress shall have exercised its power, or some case of state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands."\*

In this connection we may remark that in no state has any law ever been passed in opposition to the XIVth and XVth amendments, by which, in the language of the opinion of the Supreme Court of the United States, "state oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands." The necessity for such a law as the Civil Rights Bill has not only never arisen, but on the contrary there are some of the states which have passed civil rights bills; but, as is always the case with laws founded neither in reason, policy nor necessity, we have yet to learn of the first case that has occurred in any court of any state where such a law existed.

It can not be made to appear that the legislature of any state has passed any law repugnant to the amendments adopted since the war. The constitutions of the Southern states are in accordance with these amendments, and their supremacy fully recognized, and laws in opposition to them would be deemed unconstitutional by a state court having due regard for the sanctity of a constitutional obligation. Then how clear it is, that in accordance with the opinion of the Supreme Court of the United States, if there is no discrimination against the negro as a class, there can be no constitutional authority nor power in Congress to pass the Civil Rights Bill.

\*16 Wallace, 81.

Let it be conceded, in the language of the Supreme Court of the United States in the Slaughter House cases, that it is an enactment for the protection of the negro, yet the court has established the principle of legal as well as equitable jurisprudence on this point, and is committed to a legal view of the necessity of the act before it can pronounce in favor of the interference on the part of Congress by any legislation on the subject.

It has been said by those who advocated the passage of the Civil Rights Bill, that it involved and was designed to protect political rights. We can not see any force in the position. If parties are to be punished for the violation of political rights, they have the right of defense in the courts of law, for the violation of any law of the land. The act shows on its face that it was not considered as a political question,—indeed, we scarcely know what in a legal sense is a political question. The law prescribes penalties for its violation ; and the national courts have special jurisdiction by its terms. It is not denied that the courts have no jurisdiction over political questions ; but a statute inflicting a punishment for its violation, creates an offense against the law, and it ceases to be a political question and becomes altogether legal. In the case of *Georgia v. Stanton*,\* the court disclaimed the right to pass upon a political question. We will not discuss the distinctions between the judicial and political powers as adjusted under our system of jurisprudence.

There may be a partizan feeling moving the spirit of the law ; in a legal sense we have nothing to fear from it, if the same feeling does not invade the bench. We maintain, however, the power of the courts to hear and determine the constitutionality of law, which is involved in the trial of any cause before them, whether criminal or civil.

In the case of the state of *Georgia v. Stanton*, Mr. Justice Nelson, delivering the opinion of the court, said : " By the second section of the third article of the constitution, the ' judicial power extends to all cases, in law and equity, arising under

\*6 Wallace, 50.

the constitution, the laws of the United States,' etc., and as applicable to the case in hand, 'to controversies between a state and citizens of another state'—which controversies, under the judiciary act, may be brought in the first instance before this court in the exercise of its original jurisdiction, and we agree that the bill filed presents a case, which if it be the subject of judicial cognizance, would in form, come under a familiar head of equity jurisdiction, that is, jurisdiction to grant an injunction to restrain a party from a wrong or injury to the rights of another, where the danger, actual or threatened, is irreparable, or the remedy at law inadequate. But according to the course of proceeding under this head in equity, in order to entitle the party to the remedy, a case must be presented appropriate for the exercise of judicial power; the rights in danger, as we have seen, must be the rights of person or property, not mere political rights, which do not belong to the jurisdiction of a court, either in law or equity."\* We have before us a law, involving *rights of person and of property*, and under the above decision no perversion of the law can make it a political offense. The case of *Luther v. Borden*† has been cited. In this case the Supreme Court decided "that the circuit court had no power to try and determine this question, which, so far as the United States was concerned, belonged to the political and not to the judicial powers." But when the constitutional rights of the state are invaded, and also the liberty of the citizen of the state, they cease to be political, and become legal questions of the very highest and most vital importance. There does not exist in the theory of our government, state and political, any such latent principle, as would lead to the exercise of unlimited power in any department of either government. The legislative, executive and judicial departments are of limited and defined jurisdiction; limited because defined. These are limitations which arise from the essential nature of free governments, which are necessarily established upon limited authority; upon implied reservations of individual rights, without which the social compact could not exist, which are not only respected by law,

\*16 Wallace, 75.      †7 Howard, 1.

but by the principles of every government founded on an acknowledgement of human rights.

A very interesting case has been recently decided by the Supreme Court of the United States, at the October term, 1874. We have alluded to the Civil Rights Bill being against the spirit of the constitution, and as opposed to its object and purpose. In this case the court in examining into the extent of legislative power, not defined by the constitution, and the existence of rights in the people, which the legislative power can not take away, says: "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nevertheless a despotism."\*

It is true that there is a class of cases the decisions in which the last cited case is somewhat against, and may be considered to a certain extent overruling, like that for instance of *Sharpless v. the Mayor, &c.*, 21 Pa. St. 147, 162, in which Black, C. J., said: "We are urged to hold that a law, though not prohibited, is void if it violates the spirit of our institutions, or impairs any of those rights which it is the object of a free government to protect, and to declare it unconstitutional if it be wrong and unjust. But we can not do this; it would be assuming a right to change the constitution, to supply what we might conceive to be its defects, to fill up any *casus omissus*, and to interpolate into it whatever, in our opinions, ought to have been put there by its framers." This is the argument of Chief Justice Black in the above cited case, and it was decided in accordance with these views. This case was decided in 1853, but there is, on the legal points therein, much conflict of authority. Sedgwick, in his valuable work on "The Construction of Statutory and Constitutional Law" (the first edition of

\**The Citizen's Saving and Loan Association of Cleveland v. The City of Topeka*, 2 Cent. Law Jour. 156.

which was in 1857), remarks on the opinion of Black, C. J.: "In this conflict of opinion we can not safely pronounce the question settled on authority; but I think as a matter of reason, that we may safely hold that the legislature is to confine itself to its function of making laws." Pomeroy sustains the views of the author.\* But since this edition of Sedgwick, edited by an able and distinguished jurist, the weight of the authority of the Supreme Court has been thrown on the side of Sedgwick's well defined position. We allude to the decision of the Supreme Court of the United States, cited *supra*, "The Citizens Saving and Loan Association &c., v. City of Topeka," delivered February 9th, 1875, from which we make the following quotation: "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all limited and defined powers. *There are limitations on such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.*" This is an able and comprehensive opinion, and we are pleased to cite it in support of that wise and just principle in our national jurisprudence which embraces as a constitutional doctrine the spirit, purpose, and intent of that instrument—the constitution of the United States—which, as a compact between the states, as it limits the powers of the national government, and as it protects the person and property of the citizen, whether as a citizen of the state, or of the *United States*, gives him also the right of the protection of the laws of his state, and as a citizen of such state.

The Civil Rights Bill of the last Congress finds no constitutional support from the Fourteenth Amendment. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

\* See page 159, Pomeroy's ed. 1874.

There is no state law which makes any discrimination in favor of any person which can by possibility be construed to be embraced in the Civil Rights Bill; and to compel the hotel keeper, conductor of a railroad car, captain of a steamboat, or any of the class of persons embraced in the first section of the act, to receive or carry any person on any railroad or steamboat against the will or interest of the party having control of the hotel, etc., would be violative of the Fourteenth Amendment, by denying to such persons "the equal protection of the laws," as respects their persons and property.

Hon. H. H. Emmons, Judge of the U. S. Circuit Court, in his charge to the grand jury at Memphis, has very forcibly and clearly discussed and illustrated the principles advocated in this article, and we here insert a quotation from his celebrated opinion. The learned judge is commenting upon the Slaughter House cases, to which we have previously made reference, and expresses himself as follows:

The first proposition, that the power of Congress was not called into action under this clause, until the state, through its political power, had violated its provisions, by passing, or attempting to enforce some law, obtained the unanimous consent of every member of the court. We do not understand that this is anywhere questioned. This legislation, therefore, when no such exigency has occurred, is without authority, and it is our duty, for this reason, to advise you not to find an indictment for a violation of its provisions.

The second proposition, affirmed by a majority of the court, just as conclusively establishes the invalidity of this law. The character of the wrong done—that of excluding a citizen from a hotel and a theatre—is not such as Congress has any right to punish. They, say the supreme court, are violations of such rights as attach to a citizen of a state, and do not belong to those which he enjoys as a citizen of the United States. It is this latter limited class of rights only which the Fourteenth Amendment protects. Within this judgment, therefore, there is no power of federal legislation to provide penalties for the violation of any privilege, save the few which are enjoyed peculiarly under the federal constitution. The right to go from state to state, to visit the capital, and other national privileges, Congress may protect. All others, among which are the rights claimed to have been infringed in the present instance, are beyond its control. For this additional reason the law which attempts to protect them is void for the want of power in the body which passed it.

The Slaughter House cases were well calculated to have elicited a different judgment, if the court had not felt constrained upon principle to

decide as it did. A state law had substantially interfered with the trade and calling of a large class of citizens. Every butcher and dealer in meats over a widespread territory was compelled to pay an onerous tribute to a single corporation. But their right to carry on a trade, to acquire and dispose of property, was held not to come within the protection of the Fourteenth Amendment. There was no middle ground for the court; they must hold, either that it completely revolutionized the whole theory of our government, and transferred to federal control all those rights hitherto alone protected by state laws; or hold, upon the other hand, that it referred only to the few privileges secured by the national constitution. That court, in the same volume, applied the same principle where a woman in Illinois was rejected as an applicant for admission to the bar. It again decided that such right was not one of the immunities protected by the amendment. In 18 Wallace, a state law having deprived a citizen of the right to sell what he owned and possessed, it held that the selling of property was a privilege and immunity protected by state laws and constitutions only, and was not protected by this clause.\*

The provision of the Fourteenth Amendment that "no state shall deny to any person within its jurisdiction the equal protection of the laws," does not call for much discussion. It does not of itself confer any right or privilege. It is a formal declaration of the great principle that has been justly said to pervade and animate the whole spirit of our constitution of government, that all are equal before the law;†—a principle, nevertheless, which must needs be applied with some reserve and caution. "When it comes to be applied," says the same eminent authority, "to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions, and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security. What those rights are to which individuals, in the infinite variety of circumstances by which they are surrounded in society are, entitled, must depend upon laws adapted to their respective relations and conditions."

\* 2 Central Law Journal, 216.

† Shaw, C. J., in *Roberts v. Boston*, 5 Cush. 206.



But there may be discriminations between classes of persons when reasons exist which make them necessary or advisable; there can be none based upon grounds purely arbitrary.\*

It is a settled constitutional principle that color or race is no badge of inferiority, and no test of capacity to participate in the government, and the Fourteenth Amendment is our authority for maintaining the position; and this is the utmost limit to which eminent American law-writers have gone, among whom we are pleased to mention Judge Cooley.

Is not the Civil Rights Act unequal and partial? If so, for that reason we have high authority for opposing it on constitutional grounds. "But a statute would not be constitutional which should prescribe a class or a party for opinion's sake, or which should select particular individuals from a class or locality and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt."† This principle of law is strictly applicable to the act under consideration, which, without the sanction of the constitution, seeks to engraft a system of legislation upon our jurisprudence which is opposed to all rules of justice, of expediency, as well as of natural rights, of those natural rights which the most eminent law-writers have contended should be protected. For example, Blackstone says: "The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be the most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists principally in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the

\*Story on the Constitution, Book 3, Chap. XLVII., Cooley's ed., §§ 1960, 1961.

† Cooley Con. Lim. pp. 390, 391. The learned author also cites the cases, *Baltimore v. State*, 15 Md. 468; *Teft v. Teft*, 3 Mich. 617; *Lin Sing v. Washburn*, 20 Cal. 534.

gifts of God to man at his creation, when he endowed him with the faculty of free will."\*

*Facultas ejus, quod cuique facere libet, nisi quid vi aut jure prohibetur.*†

Burlamaqui defines *natural liberty* as the right which nature gives to all mankind of disposing of their persons and property after the manner they judge most consonant to their happiness, on condition of their acting within the limits of the law of nature, and so as not to interfere with an equal exercise of the same rights of other men.‡ "Liberty of social man consists in the protection of unrestrained action in as high a degree as the same claim of protection of each individual admits of or in the most efficient protection of his rights, claims, interests, as a man or citizen, or of his humanity manifested as a social being."§ "That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the right of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong direct expressions of such intention."||

We have endeavored to show that the constitution, before the adoption of the Fourteenth Amendment, would not authorize the passage of the Civil Rights Law; that it is in violation of the Fourteenth Amendment, and that it is repugnant to the spirit of the constitution, as well as the fundamental

\* 1 Blackstone, 125.

† 5 Inst. 1, 3, 1.

‡ C. 3, § 15.

§ Lieber, Civil Liberty and Self-Government.

|| Mr. Justice Story, *Wilkinson v. Leland*, 2 Pet. 657, 658.

principles not only of American but even of English jurisprudence, especially as it violates the right of private property, which, as has been justly said, was not "introduced as the result of princes' edicts, concessions and charters, but it was the old fundamental law, springing from the original frame and constitution of the realm."\*

TALLAHASSEE, FLA.

WM. ARCHER COCKE.

\*Arg. *Nightingale v. Bridges, Shower*, 138.

## *II. RESPONSIBILITY OF MUNICIPAL CORPORATIONS FOR IMPERFECT DRAINAGE AND SEWERAGE.*

The development of the liability of municipal corporations in the exercise of their corporate functions, in some respects resembles the extension of the liability of business corporations as to their contracts and agencies. The rule which formerly prevailed, that no corporation could be liable on a contract, except under seal, finds its counterpart in the early rule which considered all acts of a municipal corporation either judicial, and consequently imposing no liability, or as done in pursuance of power delegated by the sovereignty, and hence equally free from control or supervision. The early rule, that an indictment would lie against a municipal corporation for failure to perform duties imposed by charter, was followed by the rule established in the House of Lords by Park, J., in the case of *Henley v. Mayor of Lyme Regis*,\* that such failure would justify an action on the case at the suit of a party sustaining any peculiar damage. While it may be admitted that one of the considerations moving the sovereign to grant a charter to a municipal corporation is the remission to the corporation of a certain portion of sovereign power within the prescribed limits, yet the privileges conferred by charter are so valuable and highly esteemed by the possessors, that their value and importance form an additional consideration for the promise on the part of the corporation to fulfil the corporate duties contained in the charter. The grant is then considered to raise, on the part of the corporation, an implied promise to properly perform the corporate duties, and this implied contract made with the sovereign power enures to the benefit of every individual interested in its performance. The expression, then, in a charter, that the corporation shall construct, repair, and have complete control over all sewers, drains, etc.,

\* 5 Bing. 91; 3 B. & Ad. 77; 1 Bing. N. C. 122.

is an expression of the sovereign will, and this promise on the part of the corporation in accepting the charter, and the expectation on the part of the sovereign of its proper fulfillment, constitute one of the principal motives inducing the sovereignty to make the grant. Considering the valuable privileges conferred to be the consideration, municipal corporations, like other grantees of valuable franchises, are to be held to the strict performance of their duties.\*

The power to construct drains and gutters under streets, to move dirt and convey away water, is consistent with the care of streets, and must exist in a corporation without special authority conferred, if the general care of the streets is imposed on the corporation. The public convenience and welfare require drainage, and the title of adjoining inhabitants in the highways is subject to an easement in the public, which includes the right to repair and drain the same.†

In the exercise of corporate duties there is a distinction between those which are judicial and those which are ministerial, a distinction which Judge Dillon, in his treatise on *Municipal Corporations*, 802, calls "plain in theory but oftentimes difficult of application to particular cases." For errors in the duties of the former class the corporation is not responsible, but for errors in the latter their liability is held to be very extensive. The questions as to whether there shall be any sewerage or not is judicial ‡ as well as the choice of means, the order of time, and also as to the best plan which the means at the disposal of the corporation render it practicable to adopt.§ The exercise of the discretion or judicial function is generally by the passage of an ordinance which extends immunity from private action to those who perform the duty, but there this immunity ends—the discretion ceases after the ordinance is passed. The further prosecution of the work is

\*Cooley Const. Lims. 248; *Weet v. Brockport*, 16 N. Y. 161, note.

†Codman v. Evans, 5 Allen, 309.

‡Wilson v. Mayor, 1 Denio, 595.

§Mills v. Brooklyn, 32 New York, 489; *Thurston v. St. Jo.*, 51 Mo. 510.

purely of a ministerial character.\* It is not necessary that there should be a formal ordinance, vote, order, or resolution of the council to adopt or authorize a sewer to be built, if the sewer is, in fact, built by the city authorities, and they may make an entry in and use a private drain and thereby adopt it.†

From the proposition that the corporation can not be compelled to exercise its discretion and order a drain or sewer to be made, the unwarranted conclusion has been drawn that the corporation in building, is not bound to build a sufficient sewer; that the determination of the size of the sewer is judicial.‡ In other words, the city need not make a good or safe sewer because it can not be compelled to make any. The court in *St. Louis v. Gurno*,§ to which case there is an able dissenting opinion, consider the city as not liable for failing to make a sufficient sewer or culvert, if the construction of the sewer was proper and skillful. It is difficult to understand how a sewer of obvious incapacity could have been constructed in a proper and skillful manner.

The question of the capacity of a sewer is properly included under the rule relating to ministerial duties, which is that when the corporation have undertaken to construct drains and sewers, they are bound to exercise such care and skill as to prevent them from becoming nuisances; that having elected to act under the power granted by the charter, they must be held responsible for a complete and perfect execution.¶ This is the fair conclusion in the proposition stated in *Barton*

\* *Lacour v. Mayor of N. Y.*, 3 Duer, 406; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Emory v. Lowell*, 104 Mass. 13.

† *Emory v. Lowell*, 104 Mass. 13; *State v. Mayor*, 3 Dutch. 493.

‡ *Atchison v. Challis*, 9 Kan. 603; *Carr v. Northern Liberties*, 35 Pa. 324, and a qualified recognition in *McCarthy v. Syracuse*, 46 N. Y. 194.

§ 12 Mo. 414.

¶ *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Phinizy v. Augusta*, 47 Ga. 260; *Wilson v. Mzyor*, 1 Denio, 595; *Lewenthal v. N. Y.*, 5 Lansing, 532; *Emory v. Lowell*, 105 Mass. 13; *City of McGregor v. Boyle*, 34 Iowa, 269; *City Council Montgomery v. Gilmer*, 33 Ala. 116; *Dermont v. Detroit*, 4 Mich. 435.

v. Syracuse,\* that in constructing sewers and in keeping them in repair a municipal corporation acts ministerially, and having the authority to do the act, is bound to the exercise of needful prudence, watchfulness and care, as well as for the negligent omission to do so. This doctrine, as last stated, is approved in *Thurston v. St. Joseph*,† and *McCarthy v. Syracuse*.‡

Prudence and skill relate as well to the capacity of the sewer as to the mere mechanism in its construction. The erection of a sewer of such incapacity that every sane man knows in advance that it will not afford any relief from the consequences of obstruction to the natural drainage caused by the filling of the street, would be dispensing with the use of common sense, and by no means consistent with the reasonable care which the law requires—not merely an error of judgment, but a failure to exercise judgment at all.§ Insufficiency of sewers or gutters arising from unskillful construction, causing injury, creates a liability against a municipal corporation in damages, the insufficiency causing a nuisance.|| And the logical conclusion is the same from the doctrine frequently stated, that cities are liable for the careless and insufficient manner in which they construct sewers.¶ The liability rests upon the omission to perform a public duty.\*\* There is no defence in the circumstance that the insufficiency of the work was magnified by an extraordinary freshet. The city must provide for such freshets.†† There is an apparent opposition to this doctrine in *Mills v. Brooklyn*,‡‡ where the corporation was held not to be liable because the sewer failed to

\* 36 N. Y. 54.

† 51 Mo. 510.

‡ 46 N. Y. 194.

§ *Indianapolis v. Huffer*, 30 Ind. 235.

|| *Rochester White Lead Company v. Rochester*, 3 N. Y. 463; *Indianapolis v. Lawver*, 38 Ind. 348; *Ellis v. Iowa*, 29 Iowa, 229; *Dermont v. Detroit*, 4 Mich. 435; *Emory v. Lowell*, 104 Mass. 13.

¶ *Imler v. Springfield*, 55 Mo. 119.

\*\* *Hutson v. Mayor of N. Y.*, 9 N. Y. 163.

†† *Mayor v. Bailey*, 2 Denio. 433; *Roch. White Lead Co. v. Rochester*, 3 N. Y. 463; *Logansport v. Wright*, 25 Ind. 512.

‡‡ 32 N. Y. 489.

discharge all the water it was intended to carry off. But the reason was, that the system of sewers with which it connected could not have been made larger, and the sewer in question discharged all the water that could be accommodated by the succeeding sewer.

The Supreme Court of Illinois has adopted an advanced doctrine in reference to the duties of municipal corporations in this regard, which is the legitimate result of a theory afterwards alluded to, and that is, that it is the duty of the city to provide suitable and proper sewerage to carry off the water that accumulates on the streets.\* In this ruling the court would probably find support in Indiana and Ohio.

The work of draining a city, if not done with care, occasions damage which is not necessarily incident to the accomplishment of the public object; and the care and skill, to appear reasonable, must be exercised in all the details of the work. The city can not divide up its work, so that the inevitable effect will be to work damage and injury to adjoining land. As a matter of law it is held to be negligence on the part of the city in grading and improving two streets, to select one street and grade it, so the result would be a large accumulation of water which could not possibly escape until the completion of the grading of the cross street, when the cross street could have been first graded.† In this case, while the rule is recognized that the city can not be compelled to make a drain or sewer, yet if a drain to carry off water would constitute a part of the skillful construction of the improvement, it was the duty of the city to have such drain made, and that failure to do so was negligence. To the same point is *Donohue v. Mayor of N. Y.*,‡ where the city dammed up a stream in order to make a culvert, but omitted to make a drain or culvert to carry off the accumulating water. The omission was held to constitute negligence in the performance of a ministerial act; that the care and skill required in the execution of the work imposed on the city an obligation to make such

\* *Aurora v. Reed*, 57 Ill. 30.

† *Bailey v. Mayor*, 2 Denio, 433

‡ 3 Daly, 65.



culvert. All the auxiliaries to the main plan are ministerial in their nature.

In construction of works of this kind the true rule as to the degree of care and skill required, is that care and prudence which a discreet or cautious individual would or ought to use if the whole loss or risk were to be his own.\* Having entire control over its corporate property, it is bound to see that it is not used by any one so as to become noxious to surrounding property.†

The sewer or drain having been constructed, it becomes the duty of the corporation to keep the same in repair and in the highest state of efficiency.‡ Any such obstruction as dirt, sticks, rubbish, etc., causing the water to flow back on surrounding land, occasions a good ground for claiming damage.§ Even those courts which hold that the city is never liable for want of skill in failing to construct a sewer large enough, are singularly strict in holding that the citizen has a right to have the sewer work to the full extent of its capacity. This liability can not be delegated to any other person or corporation. It is a public duty to the citizens. This is so held in *Indianapolis v. Lawver*,|| where a contract had been made between the city and a railroad company, whereby the railroad company, for certain privileges granted over the streets of a city, agreed to keep good and sufficient sewers under the streets. In an action against the city for damages resulting from the negligence in the construction of the sewers, the city endeavored to shift the liability on the railroad company, but was not permitted to do so. An individual is, however, not permitted to carelessly

\* *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463; *Dermont v. Detroit*, 4 Mich. 435; *Weet v. Brockport*, 16 N. Y. 161, note; *Logansport v. Wright*, 25 Ind. 512.

† *Bailey v. Mayor*, 2 Denio, 433.

‡ *Hutson v. Mayor of N. Y.*, 9 N. Y. 163; *Aurora v. Gillett*, 56 Ill. 132.

§ *McCarthy v. Syracuse*, 46 N. Y. 194; *Parker v. Lowell*, 11 Gray, 353; *Child v. Boston*, 4 Allen, 41; *Emory v. Lowell*, 104 Mass. 13; *Atchison v. Challis*, 9 Kan. 603; *Thurston v. St. Joseph*, 51 Mo. 510.

|| 38 Ind. 348.

allow water to overflow and damage him when a slight exertion on his part would obviate the damage.\*

When changes are made in the drains or sewers, they must be made in a proper and safe manner, if made at all. This duty is ministerial and absolute.† There can not be such a change made as to subvert the original purpose of the work, any more than the work could be suffered to become a nuisance and out of repair.‡

For omissions to perform the duty of keeping sewers and drains in repair, the city is not absolved for want of proper notice. There should be a reasonable degree of watchfulness on the part of the city to provide against dilapidation or lack of efficiency from ordinary wear and tear, obstructions, etc. Everything which is to be anticipated in the nature of sewers should be provided for.§

There has been an effort to make a distinction between the liability for work done by the corporation on their own private account and in their public capacity,|| but the distinction does not seem to be well grounded or to have met with much favor.

While it may be too late to combat the doctrine that cities may grade their streets as they please, and change the grades, regardless of the rights of private individuals in the premises, the limitation certainly should stand, that the city has no more power over its streets than a private individual has over his own land, and can not be permitted, under the plea of public convenience, to exercise that dominion to the injury of the property of another, in a mode that would render an individual liable to damages, without itself becoming responsible.¶ The maxim, *sic utere tuo ut alienum non lædas*, applies

\* *Simpson v. Keokuk*, 34 Iowa, 568.

† *Mills v. Brooklyn*, 32 N. Y. 489; *Barton v. City of Syracuse*, 36 N. Y. 54.

‡ *Mills v. Brooklyn*, 32 N. Y. 489.

§ *Barton v. Syracuse*, 36 N. Y. 54; *McCarthy v. Syracuse*, 46 N. Y. 724; *Thurston v. St. Joseph*, 51 Mo. 510.

|| *Wilson v. Mayor of N. Y.* 1 Denio, 597; *St. Louis v. Gurno*, 12 Mo. 414.

¶ *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Reed*, 57 Ill. 30.

to corporations in the management of their corporate property, as well as to individuals. Every use of one's own property, that produces harmful results to another, is not actionable. An individual may dig down his own lands without supporting his neighbor's buildings, or may dig a well on his own premises which will abstract the supply of water from his neighbor; he may fill up low places, or, by erecting buildings, or making any other improvement thereon to more perfectly cultivate and enjoy it, cause pain to another, and his acts will be lawful, although harm may result to his neighbor from so doing. But when a corporation goes beyond the rule regulating individuals, and injury results, the corporation must respond in damages. The injury need not be the result of malice on the part of the corporation, but neglect or reckless conduct of its own property will be sufficient.

The drainage which must be most strictly provided for is that of natural streams of water.\* These streams need not be permanent or constantly running streams, but the rule includes natural watercourses, along which water frequently flows.† Equity will also enjoin the cutting of a natural pond, if damage will necessarily result,‡ and by parity of reasoning, an action for damages lies for so doing.§ As to surface-water, which the courts declare to be a common enemy, the same rule should apply to corporations that is applied to individuals. An individual may fill up low places on his lot, or erect buildings which will divert the surface-water from his own lands, and the city may fill up streets and divert surface-water, and no compensation can be recovered further than that considered in the original condemnation of the street.|| But neither the individual nor the corporation can interfere with

\* *Anthony v. Adams*, 1 Met. 284; *Perry v. Worcester*, 6 Gray, 544; *Parker v. Lowell*, 11 Gray, 353; *Sprague v. Worcester*, 13 Gray, 193.

† *Rose v. St. Charles*, 49 Mo. 509.

‡ *Pettigrew v. Evansville*, 25 Wis. 223.

§ *Miller v. Laubach*, 47 Pa. 154.

|| *Gannon v. Hargadon*, 10 Allen, 106; *Flagg v. Worcester*, 13 Gray, 601; *City Council Montgomery v. Gilmer*, 33 Ala. 116; *Imler v. Springfield*, 55 Mo. 119.

the natural flow of water, and make drains and collect the water in a body and precipitate it in a greatly increased or unnatural quantity upon an adjoining proprietor to his injury.\* The creation by the city of a stagnant or offensive pond on its premises, is an act rendering the city subject to the same liability as an individual.† The surface-water which must be endured is that which flows naturally, and damage which occurs from change in quantity or manner, creates the liability.‡ Hence, if the city by its system of drainage turns a large quantity of water so that its outlet is one place, it is a reasonable conclusion that it is under obligation to provide so that the water can escape without damage to adjoining property owners.§ And the city having collected this water into a sewer, can not discharge it on adjoining lands|| or into a private dock, and damage it by the introduction of unwholesome substances,¶ or into a mill-race.\*\*

In apparent opposition to this is the case of *Turner v. Dartmouth*,†† wherein it is held that the officers may construct drains, and if the surface-water, after flowing in them for some distance, turns upon the land of an adjoining proprietor, no action lies for the damage. This case is followed in *Judge v. Meriden*,‡‡ where the city cut a drain and diverted water upon the plaintiff's land, which otherwise would not have gone there. The majority of the court, with an admirable misapprehension of the law, consider the act of the corporation's agent, in digging the ditch, either as a judicial act or a wanton and malicious act, and in either case the city would not be liable. The proper distinction between judicial and ministerial acts, is en-

\* *Livingston v. McDonald*, 21 Iowa, 160; *Miller v. Laubach*, 47 Pa. 154; *McCormick v. R. R. Co.*, 57 Mo. 483; *Aurora v. Gillett*, 56 Ill. 132; *Aurora v. Reed*, 57 Ill. 30; *Pennoyer v. Saginaw*, 8 Mich. 534.

† *Nevins v. Peoria*, 41 Ill. 502.

‡ *Livingston v. McDonald*, 21 Iowa, 160; *Phinizy v. Augusta*, 47 Ga. 260; *Aurora v. Reed*, 57 Ill. 30.

§ *Indianapolis v. Lawyer*, 38 Ind. 348.

|| *Lewenthal v. N. Y.*, 5 Lans. 532.

¶ *Haskell v. New Bedford*, 108 Mass. 208.

\*\* *Columbus v. Woolen Mills*, 33 Ind. 435.

†† 13 Allen, 291.

‡‡ 38 Conn. 90.

tirely lost sight of, and the position taken that would lead to the absurd conclusion that the city could be held responsible for no act of its agents, except such as were beneficial to itself, the acts being considered as either wanton and malicious, or out of the scope of the servant's employment. The dissenting opinion very properly holds that there should have been made a suitable provision for the passage of the water so diverted, so as to protect the adjoining owners from damage.

The owner of property has, then, a right to rely on the obligation of the city not to create a nuisance on his lands, and hence may build his house on ground below the grade of the surrounding street, and the fact of the same being below grade, will have no effect on the question of damages;\* and the fact that the owner did not sue for damages to his lot before building, is no bar to his suing for damages after his building was erected.†

In the time of the early indulgence and reverence shown to municipal corporations, several high-sounding generalities were paraded as constituting a defence to actions for damages sustained on account of public improvements. The maxim, *salus populi suprema lex*, was said to justify the partial or entire destruction of private property for public uses. Such loss is termed *damnum absque injuria*. Courts, to escape the question, would class many wrongs under the general head of *damnum absque injuria*. The injustice of this rule, as far as it related to land adjoining streets, was first recognized, and the legislature provided compensation for the damages in opening streets, but the principle is now only slowly becoming recognized that a municipal corporation is liable in damages for every depreciation in the value of lands, whether adjoining or distant from the street, consequent on public improvements, when an individual would be liable if such improvements were made on his premises. The maxim of *salus populi*, originally applied, and can now only apply, to cases of supreme necessity, and not to mere matters of public convenience.‡ It might be conceded that in time of war private buildings might be torn down and made into barricades to

\* *Ellis v. Iowa*, 29 Iowa, 229.

† *Aurora v. Reed*, 57 Ill, 30.

‡ *Adams, J., in Thurston v. St. Jo.* 51 Mo. 510.

tained when the street is opened, but it is manifestly impossible for any jury to assess in advance the damages which may be suffered by a capricious change of grade, or a revised system of drainage. The damage caused by subsequent acts, and not thought of, or of such a nature as not to have been possibly included in the condemnation, can be afterwards recovered by action for damages.\*

The universal application of the principles above enunciated may have a tendency to contract the territory of municipal improvements, but when the time shall come that such improvements are carried on with all the circumspection that does, or should, accompany the operations of private individuals, and when the damages really consequent thereto are provided for in a perfect and logical manner, the change will not be regretted.

HENRY E. MILLS.

SAINT LOUIS, Mo.

\* *McCormick v. R. R. Co.* 57 Mo. 483.

### III. THE REPORTERS AND TEXT WRITERS.

*Anstruther's Reports.*—"A reporter of very doubtful authority." 1 Jarman on Wills, 168, note, 3d ed.

*Ashby v. White.*—The famous judgment in this case—"the crowning glory of Lord Holt"—and the judgment in the cognate case of John Paty and others, were published in 1837, by Lord Denman, from a manuscript prepared under the eye of Lord Holt himself, and which was much fuller and more accurate than the text heretofore printed in the contemporary law reports. This publication, which appeared without Lord Denman's name, was preceded by an able introduction, in which he says: "The genuine and full report of his (Lord Holt's) judgment is believed to be now first published, and is highly deserving of attention. The Lords' Report on the subject (6 Parl. Hist. 420), is a noble document, but it is thought that Holt's revised statements of his own views ought by no means to be lost." Memoir of Lord Denman, vol. II. p. 62.

*Atkyns' Reports.*—"Atkyns must have misapprehended what Lord Hardwicke said." 1 Coop. Temp. Cott. 479. "Atkyns informs us, 'Lord Hardwicke said,' etc. If Atkyns be correct, all parties would be at liberty, under that order, to examine witnesses again. Can any practitioner credit that such a chancellor as Lord Hardwicke ever made an order allowing of such a course?" etc. Ibid. at p. 561.

*Atkyns' Reports.*—*Vesey Senior's Reports.*—"The ample stores of legal wisdom which Lord Hardwicke furnished to the world, while he presided in the Court of Chancery, are treasured in the Reports of Atkyns and of Vesey Senior. The cases, instead of being classed according to the chronological order of decision, were placed under separate heads and titles, after the manner of a digest; but this plan being generally disapproved of, as less convenient for occasional reference, was discontinued in the next volume (published in 1767),

wherein the usual mode of arrangement was adopted. Mr. Vesey's work was not given to the public till 1771. It would be difficult to find in any age or nation, as the production of a single man, a more various or comprehensive body of legal wisdom, than is contained in these volumes. Though upon the whole, arranged with more care than the collection of Mr. Lee, they have not preserved the speeches of the chancellor with such accuracy as to convey a distinct impression of the style of his elocution. But however much we may regret, in a literary point of view, the condensed form in which the cases are published, if we look upon them as law reports, their conciseness certainly can not be considered otherwise than a merit." The Law Magazine, vol. iii. pp. 96, 97.

*Benjamin on Sales.*—"A valuable work." Brett, J., in *Cole v. Northwestern Bank*, L. R. 9 Q. B. 485.

*Britton.*—"This treatise was published in the time of Edward I., probably about his 13th year, in the king's name and by the king's authority." Lord Mansfield, C. J., in *Rex v. Wilkes*, 4 Burr. 2567.

*Brooke's Abridgment.*—"But Wray said that book was no law." *Simms v. Westcott*, Cro. Eliz. 147.

*Bunbury Peerage Case.*—The only authoritative and detailed report of this celebrated case is to be found in the appendix to Le Marchant's Report of the Gardner Peerage, London, 1828.

*Burrow's Reports.*—"The volumes of reports in which the words of the judge have been most carefully noted down, are those of Sir James Burrow. This reporter had peculiar advantages. He was not only furnished by Sir John Wilmot with the short abstracts of cases which that judge with great care was in the habit of drawing up from the notes he had taken in court, but it is said that he also regularly submitted his own manuscript to Lord Mansfield for approval and correction before it went to press. His reports contain in consequence a full and minute record of all that fell from the lips of one of the most eloquent men who ever presided in a court of justice; and for entertainment, or, in a certain sense for instruction, they are undoubtedly to be preferred before most



of the works that find a place in the lawyer's library. But the practical lawyer who opens them in search of information on any particular point, may often find occasion to regret the copiousness of their detail, and to wish that Sir James Burrow had imitated the conciseness of Atkyns." The London Law Magazine, vol. III. p. 97.

*Callis (Robert, Sergeant-at-Law).*—"I have often heard Lord Kenyon speak with great respect of that writer." Best, J., in *Brundell v. Catterall*, 5 B. & Ald. 282.

*Campbell's Reports.*—"We may depend upon the accuracy of this reporter" Blackburn, J., recently observed. *Redhead v. Midland Railway Co.*, 8 Best & Smith, 401.

*Cases Temp Hardwicke.*—"Lord Hardwicke's colleagues in office were Lee (who succeeded him as chief justice), Probyn and Page. The cases argued and adjudged by them, have been collected and published by Mr. Lee of Gray's Inn, whose single volume might serve as an honorable monument of Lord Hardwicke's judicial ability, even were there no other testimony of it on record. Not that any but a very imperfect idea can be derived from such a publication as this, of the copiousness of argument, or the elegance of illustration, much less of the graces of manner and diction, for which we are assured the lord chief justice was so eminently conspicuous. Of the extent of his legal knowledge, however, and the acuteness of his intellect, this book contains very sufficient evidence. Indeed, to preserve the substance, and, as it were, to condense the essence of the legal arguments employed, has been, as it certainly deserved to be, the chief object of the author of these reports; though he might, perhaps, without prejudice to this, the most important part of his task, have bestowed more attention on the minor accessories of uniformity of arrangement and of style. The cases bear evident marks of being not only written at different times, which, of course, they necessarily must be, but in some instances, published from the hasty notes taken in court, without the degree of care in the revision which would have been necessary to reduce them to the same uniform standard of concision or development. In some, Lord Hardwicke is made to deliver his judgment in the first per-

son; in others, he speaks in the third; and some, as for example that of Holmes and Gordon, are reported with such evident haste and negligence, that the first person and the third are indiscriminately employed. Perhaps the best specimens, and those which may be supposed to give the most distinct idea of Lord Hardwicke's style, are the cases in which he delivers the opinions of the court, such, for instance, as those of *The Mayor, etc., of Hastings*, and *The King v. Glassenby*, both delivered in Hilary Term, 10 Geo. II., a very short time previous to his removal from the Court of King's Bench. These cases are also to be found in Sir John Strange's Reports; but as that work comprises, within the compass of two volumes, the proceedings of King's Bench, Chancery, Common Pleas and Exchequer, from the early part of George the First's reign to 21 George II., they are, of course, reduced according to a much more abridged scale." *The Law Magazine*, vol. III, pp. 86, 87.

*Chancery Cases*.—"The Chancery Cases are very incorrect." Lord Redesdale in *Ruscombe v. Hare*, 6 Dow, 9.

*Clarke or Clerke (Franciscus)*.—*Praxis Curiae Admiralitatis Angliæ*.—"A work still of authority, published in the time of Elizabeth." Mr. Justice Swayne in *Atkins v. The Disintegrating Co.*, 18 Wallace, 303.

*Coke's Pleas of the Crown and Jurisdiction of Courts*.—"And it was observed that in these Posthumous Works of Sir E. Coke, of the Pleas of the Crown, and Jurisdiction of Courts, many great errors were published, and in particular in his Discourse of Treason, and in the Treatise of Parliaments." Kelyng, 26, 3d ed.

*Comyns (Chief Baron)*.—*Buller (Mr. Justice)*.—*Williams (Mr. Serjeant)*.—"We have the opinion of Chief Baron Comyns, of Mr. Justice Buller, and the opinion of the learned editor of Williams' Saunders, and greater authorities, so far as names are concerned, can not be cited." Pollock, C. B., in *Dyer v. Best*, 35 L. J. Exch. 107.

*Comyns' Digest*.—"So high an authority." Williams, J., in *Clarke v. Arden*, 16 C. B. 255.

*Copley (John S.)*.—Report of the Proceedings before the Se-

lect Committee of the House of Commons in 1807, in the case of a double return for the Borough of Horsham. 8vo. London, 1808.—Lord Denman, in a letter to his father, A. D. 1808, mentions, incidentally, that his friend Copley was then engaged in publishing “reports of all the election cases decided in the last Parliament,” and then continues as follows: “You will stop here and say, if Copley publishes reports of cases, why can not you do the same? The answer is, in the first place, that the different courts are already furnished with reporters; secondly, that the office of reporter is much oftener a bar than an introduction to general business. Copley’s superior powers, with the stand he has already made on circuit, are sure to bring him forward, notwithstanding that (as a reporter of election cases), he holds a position which is very commonly regarded as that of a clerk or register rather than of a counsel. Besides, reporting in one court prevents a man’s attendance in all the others.” *Memoir of Lord Denman*, vol. 1, pp. 70, 71.

*Cox’s Cases in Chancery*.—“They are neat, brief, and perspicuous reports, of unquestionable accuracy. A new and greatly improved edition” was published in New York in 1824, under the superintendence of Murray Hoffman, Esq., one of the masters in chancery. 1 Kent’s Com. 495.

*Croke Elizabeth*.—When Saunders cited this book in the Court of King’s Bench, the court “took no regard to that book; Keeling, C. J. said it were better it had never been printed.” *Mollam v. Hern*, 2 Keb. 316, A. D. 1667. This volume having been published after those which contain the reports of cases in the two subsequent reigns, was formerly cited as 3 Cro.—3 Man. & Ryl. 418, note.

*Dane (Nathan)*.—“Eminent both as a statesman and jurist.” Shaw, C. J., in *Jones v. Robbins*, 8 Gray, 347.

*Dirleton’s Doubts and Decisions*.—Lord Hardwicke took special delight in this book, saying “Dirleton’s *doubts* are more valuable than other people’s *certainities*.” Lord Campbell’s *Chancellors*, vol. VI., p. 193, note, 5th ed.

*Doctrina Placitandi*.—“Willes, C. J., said, there is more law and learning in *Doctrina Placitandi* than in any book he knew; that it contained the substance of all the pleadings in the Year

Books and Coke's Reports." *White v. Willis*, 2 Wils. 88, A. D. 1759.

*Dyer's Reports*.—"Dyer reports not the case so well as Anderson and Bendlowes." Gregory, J., in *Cudlip v. Rundli*, 1 Show. 316, 3d ed.

*Finch's Reports*.—"The book is admitted not to be very reliable authority." Williamson, C., in *Young v. Paul*, 2 Stock. Chanc. 410.

*Holroyd (Mr. Justice)*.—"His 'profound learning did not exceed his acuteness, sagacity and caution.'" Lord Denman, C. J., in *Wright v. Beckett*, 1 M. & Rob. 424.

*Holt's Reports*.—"A book of no authority." Lee, C. J., in *The King v. London*, 1 Wils. 15.

*Holt (Lord Chief Justice)*.—"Lord Denman always revered him as the greatest among his predecessors in all the long and distinguished roll of the chief justices of England." *Memoir of Lord Denman*, vol. II., p. 61.

*Joy on Confessions*.—"A very able treatise." Parke, B., in *Regina v. Moore*, 2 Denison, C. C., 527. "A very learned book." Parke B. in *Gray v. The Queen*, 11 Clark & Finnelly, 473.

*Keble's Reports*.—"Remarkable for inaccuracy." Preface to Freeman, K. B., 2d. ed.

*Kelley (Sir Fitzroy, Lord Chief Baron)*.—"A distinguished counsel, whose qualification for the judicial bench had been abundantly tested by a long career of forensic eminence, is promoted to a high judicial office, and the profession and the public are satisfied that in a most important post the services of a most competent and valuable public servant have been secured." Judgment in *Wason v. Walter*, Law Rep. 4 Q. B., at p. 90.

*Kenyon (Lord)*.—"Eldon (Lord).—"When a point has been decided by such a judge as Lord Kenyon, and the decision followed by such a judge as Lord Eldon, notwithstanding his admission that much might be said on the other side, I can not conceive a case more completely bound by authority." Sir W. Page Wood, V. C., in *Weeding v. Weeding*, 1 Johns. & Hem. 429, 430.

*Lewin's Crown Cases*.—"Lewin was not an accurate reporter." Blackburn, J., in *Regina v. Francis*, 43 L. J. M. C., at p. 100.

*Modern Reports*.—"Apocryphal authority." Preface to Freeman, K. B., 2d ed.

*Modern Reports, Vol. II*.—"Mr. Carthew cited a case, in 2 Mod. 97, to the contrary, to which Holt, C. J., *in ira*, said, that no books ought to be cited at the bar but those which were licensed by the judges." *Salisbury v. Philips*, 1 Lord Raym. 537.

*Modern Reports, Vol. VIII*.—"Lord Raymond, who decided *The King v. Harwood*, 2 Lord Raym. 1405, is more likely to be correct than the editor of 8 Modern—a book notoriously inaccurate and of no authority." Bayley, J., in *The King v. Williams*, 3 Man. & Ryl. 405.

*Morgan's Vade Mecum*.—"A proposition, in any degree questionable in its nature, ought certainly to be supported by some more respectable authority." Jackson, J., in *Jackson v. Stetson*, 15 Mass. 53.

*Mosely's Reports*.—"A book of no authority." Arguendo in *Davenport v. Davenport*, 1 Phillips, 127. "The authority of that book is very small." Thomson, B., in *Rootham v. Dawson*, 3 Anst. 861.

*Nisi Prius Reports*.—"The absence of argument and deliberation much impairs the authority of a nisi-prius decision, whatever weight may be justly due to the opinion of the particular judge." Lord Denman, C. J., in *Hughes v. Done*, 1 Q. B. 301.

*Noy's Reports*.—Mr. Hargrave writes: "In an edition of Noy's Reports *penes editorem*, there is the following observation upon them in manuscript: 'A simple collection of scraps of cases, made by Serjeant Size, from Noy's loose papers, and imposed upon the world for the reports of that vile prerogative fellow, Noy.' This account of Noy's Reports, which was probably written soon after the first publication, in 1656, though expressed in terms inexcusably gross, contains an anecdote not altogether useless." Co. Litt. 54 a, note 10.

*Parke (Baron).*—He was "probably the most acute and accomplished lawyer this country ever saw." Kelly, C. B., in *Brinsmead v. Harrison*, 7 L. R. C. P. 554.

*Peere Williams, Vol. III.*—"I may take this opportunity of observing that the cases in the third volume of Peere Williams are not of equal authority with those in the two preceding volumes, which were published in his lifetime." Shadwell, L. C., in *Hardman v. Ellames*, 2 Mylne & Keen, 752.

*Rolle's Abridgment.*—When Mr. Justice Eyre cited a case from this book, Mr. Justice Dolben answered, "That was but the opinion of Rolle." *The King v. The Bishop of London*, 1 Show. 471, 472. "Considering the great learning and accuracy of Rolle, and the greater familiarity which he undoubtedly had with ancient records than could be expected of the court in Lord Ellenborough's time, so entire a blunder as is charged upon him may well excite surprise." Patteson, J., in *Regina v. Isle of Ely*, 15 Q. B. 842.

*Salkeld's Reports.*—*House and Downs v. The Lord Petre*, 1 Salk. 311. "This purports to be a report of what occurred in the Court of Delegates; but to all who are conversant with the practice which obtained in that court, it is well known the reporter must have been indebted to another for all the information he had in respect of the decision." *Harrison v. Harrison*, 1 Robertson, 412.

*Scribner on Dower.*—"The numerous authorities have been, with great research, collated and classified by Mr. Scribner, in his recent learned treatise on the law of dower, which it is presumed will be as accessible to the profession of this state, as our own reports." *McArthur v. Franklin*, 15 Ohio State, 506.

*Skinner's Reports.*—"In Skinner, 671, however, the decision of the court is stated to have been directly otherwise; upon which Mr. Bott observes, and it should seem, very rightly, that 'this report is totally the reverse of what it ought to be.'" *Rex v. Little Bolton*, Cald. 368, note.

*Starkie on Evidence.*—"That most learned writer on the law of evidence." Lord Denman, C. J., in *Wright v. Beckett*, 1 M. & Rob. 421.

*Tidd's Practice*.—"Mr. Tidd was the Lord Coke of practice." Martin, B., in *Dyer v. Smith*, 35 L. J. Exch. 106.

*Vesey Senior's Reports*.—See Atkyns.

*Wentworth's Office of Executors*.—In *Hitchins v. Basset*, 1 Show. 534, this book is cited as "Justice Dodderidge's Office of Executor, published by Wentworth."

*Willes' Reports*, ed. Durnford.—"A valuable edition." Park, J., in *Fletcher v. Sondes*, 1 Bligh N. S. 194.

*Williams on Executors*.—"The law is stated with the usual accuracy of the very learned author of this valuable work." Napier, L. C., in *Armstrong v. Armstrong*, Drury Temp. Napier, at p. 284.

*Williams' Notes to Saunders' Reports*.—"The rule on this subject is laid down in the case of *Mayor of Ludlow v. Charlton*, 6 M. & W. 815, and that statement of it has the sanction of the very great authority of Sir Edward Vaughan Williams, who adopts it in his edition of *Williams' Saunders*, vol. 1., p. 616." A. D. 1871. Keating, J., in *Austin v. Guardians of Bethnal Green*, L. R. 9 C. P. 95.

*Williams (Mr. Serjeant)*.—Lord Eldon judicially observed, that "though one who had held no judicial situation could not regularly be mentioned as an authority, yet he might say, that to any one, in a judicial situation, it would be sufficiently flattering to have it said of him that he was as good a common lawyer as Mr. Serjeant Williams, for no man ever lived to whom the character of a great common lawyer more properly applied." And again: "The late Mr. Serjeant Williams, an eminent pleader, not merely from his acquaintance with the forms, but because there was no man whose mind was more widely stored with the principles of pleading, suggested a form," etc. *Johnes v. Johnes*, 3 Dow, 15, 20.

*Wilson's Reports*.—"Burrow and Wilson are two of the best of all the English reporters." *The Reporters*, p. 278. On a fly-leaf, in a copy of *Wilson's Reports*, in the possession of the writer, is the following note, in manuscript: "The author of these Reports was one of his majesty's counsel, and was well known to all the bench and the bar, as one of the soundest and most learned lawyers, as well as one of the most honor-

able and well informed men at the English bar. He was the son of a Mr. Wilson, who having acquired a competent fortune in the West Indies, returned to his own country, and devoted the last thirty years of a long life to philosophy and literature. *Vide* Butler's Life, p. 442."

F. F. HEARD.

BOSTON, MASS.



## IV. THE RESPONSIBILITY OF NEWSPAPERS.

1. *Journalism in the United States from 1690 to 1872.* By FREDERICK HUDSON. Harper Bros.
2. *The Press and the People.* An address at Henderson, Kentucky, May 20, 1874, before the Kentucky State Press Association, by MURAT HALSTEAD, of the Cincinnati Commercial.
3. *Prosperity of the News Press Fund.* Remarks by the Duke of Somerset, chairman at the annual dinner of the Newspaper Press Fund Society in London. The World, June 16, 1874.
4. *The Trial by Newspapers.* The Nation, July 30, 1874.
5. *The Limits of the Duty and the Privileges of the Press.* The Churchman, August 22, 1874.
6. *Trial by Newspapers.* Albany Law Journal, April 17, 1868.
7. *Concerning Contempts.* Ibid.

Mr. Hudson commences one of his chapters (LIII.), that upon the law of libel, with the remark :

The freedom of the press has been of slow growth if we take the records of courts as an indication, for the same ruling was adopted in a case of libel in the Supreme Court of New York in 1803 under the Republic, as in 1735 in the same States under a monarchy; and the same ruling has since been held in other Courts. Andrew Hamilton, in 1735, and Alexander Hamilton, 1803, occupied the same position towards the press; exhibited the same eloquence and gained the same points with the people. Our State constitutions are clear on the rights of the newspapers, but the law of libel is not so clearly defined, and much is still to be done to obtain the desired result for the press and public.

We are in some doubt whether Mr. Hudson has not confounded the public with the press in his announcement that much is still to be done to obtain what he considers the desired result in regard to the rights of the newspapers. But we are quite certain that the public has come to be much more interested to maintain the responsibility of the press than its freedom—a freedom mistaken by some for license.

We are glad to see that Mr. Halstead in a measure recog-

nizes this danger, and taking as his text the saying of George Mason, that "no man or set of men is entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services," observes :

These are words of wisdom, and there are no persons to whom they may be more useful than those described as "members of the press." We must not consent to be reckoned as a caste, to be classified as a tribe, a peculiar people set apart for stated service and special censure or reward. We must resist the presumption of ignorance in our midst, and the affectation of the vain among ourselves, that our rights are not precisely those of our fellow-citizens.

There are no privileges of the press that are not the privileges of the people. Any citizen has the right to tell the truth—speak it or write it—for his own advantage, and the general welfare. No editor can properly claim, in a court or on the street, more than that. Our equality in rights with our neighbors is positive. If we have the means of addressing a larger audience than others have, there is an increase of responsibility, not an enlargement of right.

And so Mr. Justice Daniel, in delivering the opinion of the supreme court in *White v. Nichols*,\* says that the term "exceptions" to the general law of libel, could never be interpreted to mean that there is a class of actors or transactions placed above the cognizance of the law, absolved from the commands of justice. It is difficult to conceive, he observes, how, in society, where rights and duties are relative and mutual, there can be tolerated those who are privileged to do injury (*legibus soluti*), and still more difficult to imagine how such a privilege could be instituted or tolerated upon principles of social good.

But when Mr. Halstead says that there are no privileges of the press that are not the privileges of the people, he enunciates a truth which we fear will scarcely be received with acquiescence by his brethren generally. Indeed, that the members of the press have a notion that they have rights which their fellow-citizens have not, is the occasion, or at least the justification, of his warning.

For instance, if a lawyer is engaged to examine a title, that is, to obtain all the information necessary in regard to it, and with ordinary skill to advise upon the facts when ascertained,

\* 3 How. 287.

and he does not use the utmost diligence in procuring the necessary information, he is held to the strictest accountability to his client. He is not responsible, it may be, before a jury, for his opinion upon the facts, unless his opinion is given in violation of settled law. But if he fails to ascertain any fact which diligent enquiry would discern, he is held to a rigid account at the bar where he practices, and is liable, not only for the actual damage (if any), which happens to his client, but to a loss of professional reputation far more punitive in its effect upon him. And to this responsibility he is properly held, because he must do for his client what he undertakes, just as the common carrier, the carpenter, or the blacksmith, must do for those who employ him in the calling which he professes. But who holds the editor or publisher of a newspaper responsible for a mistake in the facts which he undertakes to furnish to his subscribers?

The people of the present day desiring, as those of old, to hear some new thing, but unlike those of old who went about to seek it, contracting to have it furnished at the breakfast table, it has come to pass that we have lost all confidence in the article we bargained for, and the reporter has ceased to care for the soundness of that he undertakes to furnish.

The responsibility of the newspaper to individuals for *libel*, and to courts for *contempt*, is recognized, however feebly enforced; but there is another responsibility to which all other persons who undertake a public employment are held, from which the press, so far as we know, has escaped, and that is, responsibility for *negligence*. Those who value freedom as distinguished from license, can not be indifferent to the controversy between the law and the press which has recently taken place, both in this country and in England, and which is, perhaps, one of the most serious questions of the times.\* But

\*The Chicago Journal case, 5 Chicago Legal News, 66, 78, 85, 90, 101, 114, 174; the Chicago Times case, 8 Ibid. 221; the Memphis Avalanche case (The State v. Galloway), 5 Coldwell 326; Reg. v. Onslow and Whalley, 5 Eng. Rep., Moake's ed. 443; Reg. v. Skipsworth and Reg. v. Castro, Ibid. 456; Re Cheltenham and Swansea Railway Carriage and Wagon Co., Law Rep. 8 Eq. 580.

our present business is not with *slander*, verbal or written, nor with *contempts*, but with the responsibility of the newspaper for *negligence*.

A false report about a person, provided the words used do not come within the definition of the technical term "actionable," though it causes keen annoyance, can seldom be redressed. But sometimes such a report touches the business of some one, either (1) some third person is injured by a false statement in relation to him, or (2) the subscriber is misled by the falsity or inaccuracy of the information given him by those whose undertaking it is to furnish him with the latest and most trustworthy news. In either of these instances we are afforded some opportunity of testing the responsibility of the press. Let us see what it is.

1. Mr. Hudson, in his chapter on the law of libel, and elsewhere in his book, mentions many, and, as we suppose, all the principal actions which have been brought against editors and publishers of newspapers in this country. It is remarkable, as appears from his collection of these cases, that no distinction as to the form of action seems ever to have been taken, from the leading case, that against Zengez, the editor of the Journal, who was arrested in 1734 for repeated animadversions on the government, to the present time; but that in the suits of Fenimore Cooper, to settle the rights of editors to criticise the literary productions of others; in that of Read against the Round Table, to vindicate the morality of Griffith Gaunt; in that of Ambrose v. Daily Chronicle (Portsmouth, N. H.), in which the plaintiff was charged, in an editorial, with heartlessness and cruelty; and in that against the Herald, in 1837, for publishing, by mistake of its reporter, the name of a respectable auction and commission house in New York in its list of commercial failures in the financial revulsion of that year—in one and all of these the remedy sought was by way of libel, the only choice exercised having been as to civil or criminal proceeding.

Now, why should the merchants, who were so severely injured by the mistake of the Herald's reporter, have involved themselves in the intricacies of "the elaborate scholastic struc-

ture of malice" with which the doctrine of slander and libel is interwoven? There does not seem to have been any reason to charge the Herald with intentional wrong. But what had the injured house to do with *intentions* good or evil? Was not the Herald just as liable for the injury it had done through the carelessness of its reporter as the conveyancer who overlooks an incumbrance, or the surgeon whose knife slips in an operation, or the smith who pricks a horse's hoof in shoeing him, or the carrier who loses a package with which he is entrusted? Are newspaper editors and publishers "entitled to exclusive or separate emoluments or privileges from the community?" Or are they to be judged by the rules laid down for others, viz., that every person who undertakes a business in which the public is concerned is bound to conduct that business with reasonable care, and if, for want of such care, another suffers damage, he is liable to make it good?

Mr. Halstead answers this question very properly when he says that there are no privileges of the press that are not privileges of the people, and that if editors have the means of addressing a larger audience than others, there is an increase of responsibility, not an enlargement of right. But we can not, let us say in passing, approve the broad proposition with which he accompanies this admonition, viz., that any citizen has the right to tell the truth—speak it or write it—for his own advantage and the general welfare. There are many things true in themselves that one has no right either to speak or to write.

In relation to another subject Mr. Halstead observes: "Still the press we think strong enough to determine the law of its business." In this he is manfully urging the exercise of this assumed power in a very proper direction, viz., the suppression of fraudulent advertising by means of paid-for editorials; but in doing so he invokes the usurped power which we think lies at the root of the evil of which we complain—the *strength of the press to determine the law of its business*.

It is a remarkable fact that, though newspapers have been published in England since 1622, the title "*newspaper*" is not to be found in the books as a special subject-matter of

law. If a lawyer takes down any digest or index from his shelves, he can turn at once to the titles "Attorneys," "Brokers," "Factors," "Carriers," "Merchants," and indeed to almost any other trade, profession or calling pursued by men, and find the law of the business of each digested to his hands. But he looks in vain for the title "*Newspaper*." This is certainly singular of a business which is now carried on over the civilized world, and which perhaps is of more universal concern than any other, entering, as the newspaper does daily, into every household, visiting every place of business, and carrying everywhere its story, true or false, to the certain gain or loss of some one. Is it to the strength of the press to determine the law of its business, that we must attribute this absence of systematized law upon so important a subject?

It is scarcely less remarkable that nothing can be found as to the liability of newspapers under the head of *Negligence* in the digests, and nothing in the works upon that subject. In *Shearman & Redfield on Negligence*, a very recent work, we find the rule of negligence—"of landlord and tenant," "of master and servant," "of municipal corporations," "of owners of animals," "of attorneys," "of bankers," "of bridge companies," and "of canal companies," "of carriers," "of clerks," "of gas companies," "of physicians and surgeons," "of railroad companies and telegraph companies," and of others, but nothing of the liability of editors and publishers of newspapers for negligence in the conduct of *their* business.

We must look, then, for the law upon the subject, whether English or American, as far as it affects individuals, to the head of *Libel*. If a newspaper intentionally or otherwise offends the dignity of the court, there is a short remedy (when the court will exercise it), by way of *contempt*. But the individual who is injured by carelessness has been bound, at least by practice, to the remedy by way of *libel*, equally with one who has suffered from the malice of *slander*. The history of the doctrine of *slander and libel* in the common law is thus ably traced in an article in the *American Law Review* (vol. vi., 593). The author says, at p. 604 :

Before the invention of printing, libels were generally published by

scattering the papers containing them in the streets or by posting them in public places. Such libels were generally against the government or against persons high in authority, and by the Theodosian code the publication of such libels seems to have been looked upon as an offence akin to treason, and was punished as a high crime. The common law of England appears anciently to have taken the same view of libel, and from the earliest times the publication of a libel has, by that law, been punished as a crime. Before the invention of printing, libels upon private persons must have been of rare occurrence, though two instances of such libels, in the reign of Edward the Third, are mentioned by Coke. In each of these cases the libeller was criminally punished. The art of printing was introduced into England in 1474, nearly two hundred years after the introduction of the action upon the case. When the knowledge of reading and writing became common, and the less injurious kind of private libel came to the attention of the courts, they naturally would be held to be indictable, as coming within the definition of the crime sanctioned by precedent, all defamatory matter in writing being libellous, and being indictable upon the criminal side of the court. After the introduction of the action upon the case, the court could consistently give a civil action for damages, etc.

It is curious and instructive to observe how the lawyers of England, influenced by the scholastic subtleties of ecclesiastical law, and our own after them, following precedent, soon narrowed that most equitable of actions at common law, the action upon the case, so far as this subject is concerned, to a special subdivision, whereby it admitted all the technical niceties of the doctrine of malice expressed and implied.

We can not think any subject more within the remedy of the action upon the case than the injury done to a person by the carelessness of a newspaper reporter. A merchant becomes involved in litigation, and is sued for a large amount; the jury render a verdict in his favor, but the reporter of the local press carelessly makes a mistake, and his paper publishes a verdict against the defendant. Of course it is explained as an accident, and the mistake corrected in a later issue, but the damage is already done. Again, a respectable house of merchants is reported as having been adjudged involuntary bankrupts, and the report is republished by the papers in the section of the country from which their business comes. This, too, is explained as a mistake, having done which, the publishers think all proper amends made. These are not cases

for libel, but are they not for the action upon the case?

It will be recollected we are not now treating of *slander*, verbal or written, but of that class of injuries caused frequently by the mere carelessness and indifference of newspaper reporters and publishers—a carelessness and indifference often as injurious by the suppression of the truth as otherwise, and for which the publisher is equally responsible as for the insertion of a false report.\*

It is bad enough to have a false story upon an indifferent subject, but it is often worse than that, and one reads in the newspaper an account of himself often in connection with some matter with which the public has really no concern, which, however inaccurate, has just enough of truth in it to make an explanation of the annoying, or perhaps painful, misrepresentation extremely difficult, and to render one liable, if he seeks redress, to be turned out of court with the maxim *de minimis non curat lex*.

The "great men" of old seem to have experienced this difficulty, and in a measure at least to have provided against it. The Stat. West'm. 1, ch. 34, commanded "that none be so hardy to tell or publish any false news or tales whereby discord or slander may grow between the king and his people, and he that doth so shall be taken and kept in prison until he hath brought him into the court, which was the first author of the tale." And Stat. 2, R. 11, ch. 5, provided that "none shall devise or speak lies or other such false things of prelates, dukes, earls, barons, and other nobles, and great men of the realm, and of the chancellor, treasurer, clerk of the privy seal, steward of the king's house, justice of the one bench or the other, and other great officers of the realm, and he that doth so shall incur the pain of the Stat. West'm. 1, ch. 34."

These statutes did not expressly give an action, yet it was soon holden that a party injured might maintain an action thereon, upon the principle of law, that an action lies on a statute which prohibits the doing of an act to the prejudice of another,† and the "great men of the realm," though not

\* *Lewis v. Levy, Ellis, Blackburn & Ellis*, 537.

† *Selwyn, Nisi Prius*, 1053.



the common people (because the common people were not within the statute), can maintain actions for slander for any spoken, or, as we suppose, published defamation, without alleging any special damage, although the words did not impute a crime or a specific disease, and although they are not spoken of the plaintiff in reference to his trade or occupation.

But why not extend this rule of *scandalum magnatum* to the case of "false news" and "false things" published about anyone? Did not these "great men" learn, and teach us a lesson worth knowing, namely, that there can be little or no redress against published falsehood and misrepresentation, if the injured person must show the words used "actionable," or else prove some special and immediate damage therefrom?

A very wise provision is made in England, by statute, 6th and 7th Vict., ch. 96, § 2, in a measure both for the protection of publishers from unfounded or vindictive actions—and at the same time for the redress of those injured by them, however innocently. It provides that in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent for the defendant to plead that the libel was inserted without actual malice and without gross negligence, and that he had, before the commencement of the action, or at the earliest opportunity afterwards, inserted in the newspaper or other publication, or, under certain circumstances, in some other publication, selected by the plaintiff, a full apology for the libel, and upon filing such plea the defendant shall be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel.

But it is curious to observe here, that still the only idea of redress for injury by publication is that by way of libel. Why, again we ask, should the injured party entangle himself in the meshes of the law of implied or express malice in slander and libel, rather than rely upon the action upon the case, which the law gives to the party grieved for a misfeasance in the trade which the offender professes?

2. We have thus far considered the responsibility of the

newspaper in relation to third persons who are injured by false statements in relation to them, viz., its liability in an action upon the case for *tort*. Let us now turn to the case of a subscriber who is misled by the falsity or inaccuracy of the information given him by the newspaper which has undertaken to furnish him with the latest and most trustworthy news, viz., its liability in an action upon the case *ex contractu*.

"When it is proposed by publication to do a certain thing on certain terms, one who desires that thing to be done will be supposed to assent to them. Thus, it has been held at *nisi prius*, that if the publisher of a newspaper places distinctly, in the usual place of his paper, the terms of advertising, one who orders advertising without special bargain as to the terms, is to be regarded as assenting to the published terms."\*

This is newspaper law, a rule in the interest of the press, and for which the press would struggle with earnestness. It is scarcely a good rule, however, which does not work both ways. If the merchant who sends an advertisement to a paper, is bound by the terms which the publisher has placed in the usual part of his paper, is not the subscriber, who has taken the paper upon its prospectus or advertisement to furnish him with the latest and most trustworthy information by telegraph and mail, entitled to the benefit of the same law? Is not the editor or publisher responsible when he publishes in the column of News by Telegraph, a slip which he has cut from other papers received by mail? Is he not responsible to one who is induced by a false report as to the market of a certain article, to make an investment which injures him?

It is the settled rule with regard to common carriers, that if goods are delivered to a person in a public employment for a purpose in respect of which he is to have a reward, he is answerable for any loss or damage which is not occasioned by the act of God or the public enemies. "And it has frequently been observed," as it is said, "that rigorous as the rule may seem, and hard as it may be in one or two particular instances, yet it is founded on the great principles of public policy and

\* Parsons on Contracts, vol. 1, p. 476.

convenience, to which all private considerations ought to yield, for the public is obliged to rely on the good conduct of carriers whose education and morals are usually none of the best, and who might have frequent opportunities of associating with wicked and dishonest persons, while the injured person could seldom or never obtain legal proof of such combinations, or even of the negligence, if no actual fraud had been committed by them to the injury of commerce and extreme inconvenience of society."\*

Now, why should not the newspaper editor, a person in a public employment for a purpose in respect of which he is to have a reward, who undertakes to obtain for, and to carry to his subscribers the latest trustworthy news, be likewise answerable for any loss or damage occasioned by his negligence or carelessness? Barring the imputation which Mr. Comyns casts upon the education and morals of the common carrier, which, if merited at the time he wrote, can scarcely now be laid upon that class of merchants and capitalists who, since the general use of steam have been engaged in the business of carriers, and have been held to its strictest responsibility, the reason of the paragraph we have just quoted applies with equal force to the publisher of the newspaper. He has as frequent opportunities of associating with wicked and dishonest persons, while the injured party can seldom or never obtain legal proof of such combinations, or of his negligence.

But there is another aspect in which the reading public is now forced to consider this subject, that is, in relation to the limits of the duty and privileges of the press in the matter of their reports. The Nation asks, is it not somewhat disgraceful to our civilization that such quarrels as that which has filled the press throughout the country for nearly a year, should have to be fought out in this way, and that we should have to protect happiness and purity by inviting the whole world to see the furies tearing a household to pieces? And the Churchman complains that there seems to be practically no limit to the business of prying into private affairs. But unless it be indeed true that the press is strong enough to de-

\* Comyns Contracts, vol. II, p. 291.

termine a law of its business as against that prescribed by the courts, there are well defined limits to the duties and privileges of the press in this respect. We have not now the space, nor is this the occasion to discuss what those limits are, as we are discussing the responsibility of the newspaper for *negligence*, and not at present its responsibility for the *slander of individuals* or for *contempts* of courts. The books are full of rules upon the subject.\*

But why, for instance, should a publication of a trial be restricted to the actual proceedings in a court, and any observations or comments in addition to what forms strictly and properly the legal proceedings, a publication of an assumed result of the evidence, and the speech of counsel without the evidence itself be prohibited, if a party be dragged by the newspapers before a tribunal constituted *by* themselves and *of* themselves, a tribunal well described by the Nation as a "court which has no rules of evidence; before which nothing is frivolous, or irrelevant, or untrustworthy; which puts rumors, suggestions, theories, suspicions, reminiscences, hints, the idle gossip of the sidewalks, and the solemn asseveration of eye-witnesses, on or about the same level? Of what avail any rules, however carefully and wisely prescribed in regard to the publication of what has actually taken place in a court of justice, if the newspaper is allowed to anticipate all that should be said and done, and *only* said and done in the court? In the language of the learned judge in *Rex v. Crevy*, suppose an indictment for blasphemy, or a trial where indecent evidence is introduced, is every one at liberty to poison the minds of the public by circulating that which for the purposes of justice the court is bound to hear? If the courts will not allow to be published that to which they have been forced with pain to listen, from which they have excluded all that was irrelevant to the point before them, and in which they

\* *White v. Nichols*, 3 How. 287; *Johnson v. Evans*, 3 Esp. 32; *Curry v. Walter*, 1 Bos. & Pul. 525; *Rex v. Curry*, 1 M. & S. 273; *Rex v. Carlisle*, 3 Barn. & Ald. 167; *Delgal v. Highby*, 3 Bing. N. C., 650; *Lewis v. Walter*, 4 Barn. & Ald. 605; *Flint v. Pike*. Ibid. 473; *Stockdale v. Hansard*, 9 A. & E. 1; *Rex v. Crevy*, 1 M. & S. 273; *Rex v. Fisher*, 2 Camp. 563.

have admitted only that which well considered justice required, with how much greater condemnation should they treat the reckless publication of scandalous and indecent matter relating to cases which must eventually come before them, and from which they have not had the opportunity of excluding what was not absolutely necessary to the case, and which is published simply because of its impurity?

The forestalling the judgments of the courts has become a great evil in this country, an evil which has grown, as many another, because of the supposed desirable object in each particular instance sought. The public applauded the interference of the newspaper in certain recent notorious instances, until the papers claimed the credit of having brought the criminals to their doom. Many thought the doom of these unfortunate persons just, and many that others should have had the same, but a few recognized and trembled before the power, the exercise of which the multitudes were applauding.

Mr. Hudson closes his chapter on libel with the remark:

To-day the newspapers are filled with personal allusions, and all sorts of charges are made against individuals and officeholders. Some of them are of a very serious character. These charges are against presidents and politicians, lawyers and lobbyists, clergymen and choirs, counsel and clients, brokers and bankers. Notes of correction are sometimes published. No other notice is taken of many of them. Still the Herald says there are nearly a thousand suits pending, with \$50,000,000 in damages depending on the result.

Let us have a national law of libel—a national code that will benefit alike the press and the public. That will be a step in the right direction.

The law of libel is quite as favorable to the press as it should be. The more easy and certain step in the right direction, we would suggest, is to hold the press responsible to the laws which regulate the conduct of others. That in seeking redress for injury by publication, instead of always proceeding by libel, we should go back to the simple action upon the case which the law gives against one for a misfeasance in the trade which he professes, and hold the newspaper responsible for the negligence of its reporter, without involving ourselves

in the meshes of the law of libel, and the intricacies of the elaborate scholastic structure of malice.

The liberty of the press is the boast of our country. We would not curtail its liberty, but check its license. We would have the press governed only by the laws that control the conduct of others.

EDWARD McCrady, Jr.

CHARLESTON, S. C.

## *V. THE BENCH AND BAR OF THE SOUTH AND SOUTHWEST.*

The duty which has been somewhat unexpectedly devolved upon me of giving to the readers of this REVIEW some account of the bench and bar of the Southern and Southwestern states of the Union, and which was but commenced in a former number of this periodical, will now be resumed.

It is possible that there may be some by whom the propriety may be a little questioned of an attempt being thus made, however modestly, to preserve the scattered and fast disappearing memorials of a class of individuals concerning whose merits and achievements the opinions of mankind, in different countries and ages, have not been altogether identical. To the more liberal-minded the facts presently to be adverted to may perchance supply some excuse for an undertaking which might otherwise be recognized as alike superfluous and obtrusive.

In the more prosperous and enlightened communities which have heretofore existed, lawyers, whether performing the ordinary duties of their calling, or elevated to positions from which it is expected that they will authoritatively enunciate the principles of jurisprudential science, and take adequate measures also for the maintenance and enforcement of those principles, have been, from time immemorial, recognized in many important respects, as indispensable civil functionaries, and as such, invested with certain peculiar powers and privileges, and also held amenable to a number of grave and delicate responsibilities, from which other members of the body-politic are altogether exempt. The customary presence in courts of justice of attorneys and counselors, and their habitual participation in the most solemn and interesting judicial proceedings, have naturally caused them to be considered a constituent part of the court itself, or at least as an essential appur-

tenant thereto. Nor is this to be at all wondered at, since many of the functions which they are expected to take upon themselves, and for the failure to discharge which with fidelity and efficiency they are subject to be held to account, are of a nature alike needful to the convenient and satisfactory dispensation of equity between man and man, the due enforcement of the law of the land, and the upholding of the governmental authority itself. It can not well be denied that the institution of a wise and practicable system of judicature is one of the distinguishing characteristics of what is called *civilisation*—that highest form of social organization—which system, though, to be of any appreciable value, must, of necessity, be fairly and impartially administered. Otherwise, indeed, the evils of disorder and anarchical lawlessness—not seldom resulting in *mob despotism*—that fearful omen of returning barbarism and badge of municipal dishonor, must inevitably ensue. But it would be in the highest degree absurd to expect laws, however artistically framed they may be, to prove wholesomely operative unless they shall become *intelligible* in some way, with a view to their enforcement among those for whose benefit they are framed. That is to say, they must be completely understood by the mass of those subject to their authority, or by some special class of persons capable of supplying a reasonable and adequate explication of them. Now, it is exceedingly plain that this matter is one to which the citizens can not give due attention by reason of their being necessarily otherwise occupied. Nor should the fact be overlooked that uniform experience has shown—what would be perhaps sufficiently evident in itself without this aid from experience—that legal requisitions of almost every description are seen to multiply in number, and to take upon themselves also an increased complexity of structure, in proportion as society advances in wealth and refinement; thus rendering the task of interpreting them more and more difficult; as well as the skilful ministration of remedial expedients needful to be resorted to for the speedy and, effective redress of violated rights, or for vindicating the majesty of the violated law by the exemplary punishment of flagrant wrong-doers. In such



a state of affairs the perpetual presence in the bosom of the community of a class of individuals whose minds have been especially, if not exclusively given to the study of law as a science, as well as to all the technical formalities of its administration, seems too manifest to need a more elaborate explanation. It is in this view of the subject that the whole body of the community is deeply interested in all things appertaining to the history of the legal profession, in the advance of those belonging to it in intellectual culture, and the preservation among them of the purest and most elevated morality.

It is scarcely necessary, after what has been already said, to suggest that the members of the bar in a free country like our own, have it in their power, both individually and collectively, to render great and peculiar services to the community in which they have been given a commission to expound the solemnly enacted laws of the land, and to take upon themselves the most important *fiduciary* responsibilities. It is equally true that the chosen profession opens to them opportunities of perpetrating much evil, and of setting a bad and deleterious example of demoralizing and disgusting iniquities before the eyes of their own and of future generations. That the well-recognized duties of their vocation expose them to special and almost overwhelming temptations to extreme selfishness and perfidy, can not be denied—which temptations, if unwisely yielded to, may bring upon them irreparable disgrace, but which, if resisted with manly firmness, may secure to them imperishable honor,—there are few who do not understand.

The history of lawyers, both in Europe and America, has much of what they may justly feel proud, and more, also, than it is pleasant to remember, over which no good and upright man feels otherwise than chagrined and horrified. Whilst the Somerses, the Hardwickes, the Holts, and the Erskines of England; and the Marshalls, the Kents, and the Choates of our own favored land, have reflected a glory upon the class which they so highly adorned, it is not to be forgotten that such monsters as Jeffreys, and Macclesfield, and others, whose names all upright attorneys and high-souled men are

reluctant even to pronounce, *have lived*, and have left behind them memorials of dishonor, the humiliating mention of which can never cease to kindle afresh the sentiments of lamentation and contempt.

It must be obvious to all but those whose deplorable obtuseness of intellect no reasoning can penetrate, that the indiscriminate advocacy of right and wrong, *for money, or for money's worth*, is a fearful trial for the soul of man in its present feeble and degenerate state, and that members of the bar of no little respectability in certain social circles, have before now been known, with too careless a scrutiny of facts, to make engagements for the rendition of professional service to individuals, who, on fuller investigation, they can not avoid discovering to have been guilty of abominable knavery, is a position not to be denied; and if Lord Brougham be correct in asserting that no discovery of corruption or turpitude on the part of his once recognized client can justify the lawyer in ceasing to represent his interests, it is manifest that the dignity of a useful and venerated profession may be occasionally put in jeopardy, in the way just indicated, by men who would be as far as any other individual that can be mentioned, from *deliberately* doing aught which the sternest and most upright moralist would hesitate to sanction and defend.

That, upon the whole, at least for some generations past, in all countries where lawyers are known, their example and influence as a class, have been, in general, favorable to sound morals, as well as to the advance of civil and religious freedom, I do not myself at all doubt; and I have little fear that a majority of the attorneys in these United States will ever fail to remember that the world has a right to look to them confidently for the avoidance of all those wretched arts of chicane and knavery which some whom our highest courts are sometimes compelled to recognize as entitled to address them, have been known unscrupulously to put in exercise, and unblushingly to defend. Long may the members of the American bar, in general, and the members of the bar of the Southern and Southwestern states in particular, bear vividly in mind, that by them, if at all, are the hidden villainies of the world

to be brought to light and to be punished; profligacy, however plausible, to be unmasked and brought to shame; and the betrayers of the cause of freedom to be consigned to undying infamy. Let them ever recollect that it is their high and inestimable privilege, by judicious and seasonable counsel, to rescue their clients from the fangs of merciless cupidity, and from unmerited ruin; to defend their characters against unjust reproach, no matter how potential may be their assailants, and whether these assailants shall be few or many; to rescue their lives, it may be, from the perils in which calumnious accusations may have involved them;—that on the bench, at the bar, in grave deliberative assemblies, or as the sworn official advisers of government, glorious opportunities are presented to them of earning solid and enduring fame; of proving themselves to be great national benefactors, the defenders and upholders of such civil institutions as the world has never seen but once; and the fearless and indefatigable champions and promoters of social reform and progress.

Before these general remarks are brought to a close, I must ask permission to cite a short and gratifying extract from the pages of one, of whose profound abilities and marvelous scientific attainments America and mankind in general may be justly proud. Dr. Draper, in his "Intellectual Development of Europe," speaking of the two professions of law and medicine, says: "It is to the honor of both these professions that *they* never sought a perpetuity of power by schemes of vast organization; never attempted to delude mankind by stupendous impostures; never compelled them to desist from the expression of their thoughts, and even from thinking, by alliances with civil power. Far from being the determined antagonists of human knowledge, they uniformly fostered it, and, in its trials, defended it. The lawyers were hated because they replaced supernatural logic by philosophical logic; the physicians, because they broke down the profitable but mendacious system of miracle-cures by relics and at shrines."

But it is time that I should proceed to the immediate task before me. Without dilating further, for the present, upon the members of the bar flourishing in the state of Alabama, be-

tween the years 1825 and 1830, and for some twenty years thereafter (some of whom will demand more or less notice hereafter), I must ask the reader to descend, in imagination, with me, the Mississippi river, in the month of December, 1830, for the purpose of surveying the condition of the bench and bar there at that period, and tracing a number of scenes which afterwards occurred in that stirring region, and of which I was myself a very close observer.

I journeyed, during the year and month just named, to the city of Natchez, then a place of much commercial importance, and possessing a population full of intelligence, enterprise, and refinement. There Burr had been the recipient of a cordial and splendid hospitality, on his first descent to New Orleans, where he was expecting, in concert with General Wilkinson and others, to mature his grand scheme for organizing a new Anglo-American empire in Mexico. In the little village of Washington, only a few miles from Natchez, had he undergone that memorable judicial examination which, despite the energetic prosecution of the afterwards celebrated George Poindexter, speedily resulted in his honorable acquittal. Here sojourned, for some years, the ill-fated Blennerhasset, whose paradisaical residence on an island of *La Belle Riviere*, was on the occasion of the trial of Burr for treason, afterwards so gorgeously depicted by William Wirt. In Natchez I found residing, when I reached there, several most accomplished and affluent citizens who had been the known associates of Aaron Burr; among whom were the financial magnates of that period, James C. Wilkins and Stephen A. Duncan. The very hotel at which I was entertained in 1830, was kept by a Mr. Parker, who was also one of the "Burr men," as they were called, and from whose lips I heard much of the famous expedition, in which he was not at all ashamed to acknowledge that he had borne part. On the very night that I reached Natchez, I saw the son of Blennerhasset lying dead drunk upon the pavement in front of the Parker hotel, and who (as I was told) having been, during the day which had just closed, refused by the medical board of the state, then in session, a license to practice the *curative* art, had solaced his

chagrin by huge potations of alcoholic fluid. *Sic transit gloria mundi!!*

The supreme court of the state was sitting when I reached Natchez, and many attorneys were in attendance thereupon, some of whom lived in remote counties. I had brought with me letters of introduction to several prominent members of the bar, whose civilities to me were of a far more marked and cordial character than I had even anticipated. The supreme court was at that time composed of five judges; whose decisions, up to about that period, had been, a short time before, placed in the hands of a diligent and accomplished lawyer for revision and publication. These decisions will be found embodied in a single small volume known as Walker's Reports, but few copies of which are now extant, the work itself being mainly of value because of Mr. Walker's copious and learned notes, with which it is besprinkled. The names of the supreme judges were as follows: Turner, Child, Nicholson, Black, and Cage.

Chief Justice Edward Turner was a man of uncommonly striking appearance. He must have been considerably more than six feet in height, slenderly and even delicately shaped, with a bright and genial countenance, and of exceedingly kind and conciliatory manners. He was born in the old county of Fairfax, in the state of Virginia, and, as I have heard from his own lips (and which I remember to have once seen mentioned in a printed circular over his name), was grandson to the Mr. Payne whom Weems, in his Life of Washington, reports to have once had a serious collision with the Father of his Country at Fairfax Court House, when Washington was there engaged in the raising of military recruits for the ill-fated Braddock campaign. This historic incident Mr. Weems seems to have regarded as worthy of being transmitted to posterity, by reason of the fact that it presents perhaps the only occasion when Washington was known to have been guilty of offering to any individual an unprovoked insult, as on account also of his having set the meritorious example of at once tendering the *amende honorable*. Early in life, Judge Turner, with most of his Virginia kindred, removed to the state of Ken-

tucky, and located in the neighborhood of Lexington, where so many distinguished men have since flourished. There he read law with the once famous George Nicholas, the intimate friend of Thomas Jefferson for many years, and to whose hands Mr. Jefferson will be remembered to have transmitted the *original draft*, in his own hand-writing, of the never-to-be-forgotten Kentucky resolutions of '98-9; in which it is emphatically stated, that for certain palpable breaches of the federal constitution, "*nullification is the rightful remedy.*" Mr. Nicholas was always mentioned by Judge Turner in terms of respect and gratitude, and to his valuable instructions he was disposed to attribute much of his own subsequent success as a lawyer. On migrating to Mississippi, then a territory, Judge Turner established himself in the bosom of a small interior village, where he commenced the practice of his profession, holding at the same time the office of justice of the peace, which latter he found quite profitable. Having there accumulated several thousand dollars, in a few years he removed to the city of Natchez, where he soon took very creditable rank as a lawyer, in time made a large fortune, became eminently popular and influential, and was at last elected to the dignified station which he now held. His intellect was of a sound and practical cast, his industry was most remarkable, and he was of unsurpassed integrity. His warmest friends did not claim for him any very extraordinary knowledge of law as a science, and he had no literary attainments worth noting, beyond the sphere of his own chosen profession. He was a most exemplary person in all the domestic and social relations, and, on several trying occasions, and especially in the perilous season of 1851, is known to have given evidence of a steady and fearless patriotism worthy of the last ages of Greece and of Rome. His devotion to the federal union was as intense as that of Mr. Clay himself, of whom he was always a great admirer.

Judge Child was quite a *sui generis* personage. He was a native of New England, was said to be of good parentage, and had been educated in the best New England style. He was a good Latin and Greek scholar; had read law with

both attention and success; had traveled a good deal; knew much of the human character; was not at all choice in his companionship; drank freely; swore hard; was lively in social converse, but much given to satirical remark; in colloquial controversial dispute was supposed by some to have greatly excelled; spoke kindly of nobody; delighted much in the use of fire-arms and in hunting; was a good horseman; of fierce and indomitable courage; believed devoutly in the duelling code; spoke slightly of womanhood in general, and lived and died a bachelor. He was about five feet seven or eight inches in height; of a body as long in proportion to the distance of his head from the ground, when he was standing erect, as his legs were short. His mind was agile and vigorous; he always expressed himself, in his written opinions, with clearness and precision; and always with a decided aversion to long and flatulent speeches, to turgid declamation, or the copious citation of books of authority. He exclaimed from the bench of the circuit court in Port Gibson, once, when a lawyer of some standing had, after reading in his hearing the whole of quite a long judicial opinion, announced with an air of pleasant exultation, that he had lying before him, at least *seventeen* decisions of various respectable courts precisely to the same effect, to all of which he proposed to invite his honor's attention, "What! Do you say that these authorities are all to the same effect?" "Yes, sir," answered the delighted and learned advocate, "I do; they are all to the same effect, precisely." "I am really rejoiced to hear it," said the sneerful judge; "and you will please have the goodness to read again the decision I have already heard read with such exquisite pleasure; as I thought it read very well; and if you will read it over again sixteen times, we shall all understand it perfectly, and be able to give it such application as may be right, to the case now to be decided."

On another occasion, when holding court in the city of Vicksburg, my old and worthy friend, Judge Coalter, commenced reading a few extracts from a legal authority of the highest character, in elucidation of a question which had arisen on demurrer. He had scarcely opened the book before Judge

Child interrupted him, and said, "Judge Coalter, put down that book; I have read all the law in the world, and recollect well what I have read. I want no aid from the musty volumes you have brought into court. If you have any *original* views to bring forward, I will listen to you; otherwise I think you would do well to take your seat." Coalter, in mute surprise at this wonderful amount of learning so modestly confessed by the judge, took his seat accordingly.

I heard Judge Child relate one day, that he had a few weeks before returned from a visit to his native town in New England. His father, he said, having recently died and left him some real estate, on arriving at the place where his property was located, he sent a message to a tenant of the premises, demanding the payment of the rent which remained unpaid. "And what," said he, "do you think of this fellow's impudence? He refused to pay me a dollar, and declined recognizing me as landlord; whereupon I hurried to his residence, had myself announced, and on the scoundrel's making his appearance, I told him that I had come to force him to '*attorn to me*,' and if he did not do so at once, I should certainly give him a severe caning—calling his attention significantly to a large cane which I then held in my hand. You may rest assured that the delinquent tenant did attorn, and in double-quick time."

Judge Child was often known to sit on the bench in some of the then newly-settled counties of the state, when so much overpowered with the draughts of intoxicating drink which he had recently imbibed, that, notwithstanding his ability and learning, he was wholly incapable of conducting the business of the court in a decent and orderly manner. This was particularly the case in the town of Benton, during one of the last courts he ever held in the state, on which occasion I well remember his calling up to the bench, one day during the trial of a most important case, a drunken attorney to preside in his stead, whilst he went across the public square to a low drinking shop to "wet his whistle," as he said. It was in this town that after he had been holding court for a week, and rendered many judgments, he fell into a fit of ill-humor, and avenged



himself on the members of the bar at whom he had taken offence, by suddenly mounting his horse and riding out of town, after having made an order for final adjournment *without signing the minutes*—thus leaving all the judgments he had been granting mere *nullities*.

It is certainly true that the very outrageous official conduct of Judge Child, together with the ascertained impossibility of getting rid of a judge misconducting himself ever so grossly, by *impeachment*, contributed very materially to the change which was at this period effected in the state constitution—by means whereof the election of judicial officers was vested in the people, and the life-tenure, then existing, changed to a term of years.

I have already stated that Judge Child was not averse to the settlement of personal difficulties upon what is called the field of honor. Indeed I have scarcely heard of a more desperate duel than that which occurred between himself and a gentleman whom I once knew well, General Joor. The latter was a native of South Carolina, and was not a little proud of his place of birth. He was an ardent admirer of John C. Calhoun, and sympathized warmly with the body of politicians in the South, of which he was the acknowledged head. General Joor was in affluent circumstances, a planter by occupation, a kind-hearted and sociable gentleman, but of a temperament highly inflammable. I never knew the precise origin of the dispute between himself and Judge Child which resulted in the hostile meeting already referred to. They agreed to a *rendezvous* on the verge of the little village of Woodville, in the vicinage of which they both resided, where the parties were to appear on a certain day, without regular seconds on either side, armed and accoutred according to their own taste, and to fight in such manner as might be most agreeable to them. Child came attended by a large mulatto body-servant, who drove a vehicle of some kind to the field of combat, loaded down with muskets and pistols, which he was to hand out to his master as the exigencies of the battle might render necessary. This duty he is said to have performed with singular coolness and address. The parties were, I be-

lieve, both severely wounded, but neither of them mortally. General Joor I know to have borne the marks of the conflict upon the fingers of his right hand all his life afterwards.

And here I am tempted to relate, by way of episode, another affair of this kind, which occurred some years subsequent, between the oldest son of Benjamin Watkin Leigh of Virginia, and Colonel Fielding Davis, who was afterwards federal marshal in Mississippi, and a very worthy and chivalrous gentleman. Leigh was an exceedingly promising young member of the bar of Woodville. The parties fought not far from Woodville, and Leigh was unfortunately killed.

Judge Ira R. Nicholson, also a judge of the supreme court at the period referred to, was born in Georgia, and was for some time a lawyer in the southern part of Alabama, before he settled in Mississippi, where he very soon obtained a respectable standing at the bar. I practiced before him for some years, and ever found him good-natured, affable, attentive to his official duties, and in all respects a trustworthy person. He was never at all inclined to make himself a profound jurist, and was generally occupied, when not on the bench, with pursuits not at all calculated either to enlarge the amount of his legal attainments, or to expand and invigorate his intellect.

Judge Black was born somewhere to the north of Mason and Dixon's line, and his education had been there so well attended to as to enable him to teach a select classical school for several years before he took his position at the bar. He was very young when raised to the bench, and had awakened expectations of high distinction in his profession, never fully realized. Being elected to the position of United States Senator in place of Judge Powhattan Ellis, who had been just appointed federal district judge by President Jackson, he there, as the colleague of the celebrated George Poindexter, opposed very warmly the Democratic administration then existing, and, in consequence lost his popularity in Mississippi. After leaving the senate he recommenced the practice of law, but gained little additional reputation at the bar.

Judge Cage was born and reared in Tennessee, and was a member of a very extensive family connection in that state, a number of whom I have very favorably known. He was a man of much intellectual vivacity; of a warm and sympathetic heart; brave almost to a fault; exceedingly energetic and enterprising, and the delight of every social circle into which he entered. He was fond of novel reading and politics, and had but little relish for law books. His congeniality of temper; his overflowing facetiousness; his rare talent for relating amusing personal anecdotes; his kind and unassuming manners, and his well-known sincerity and manliness, made him a general favorite. He served, between 1830 and 1834, for a short time in Congress, and took part in some of the stormy debates of that period, but soon voluntarily retired to a fine plantation which he owned in Louisiana, where he lived for many years in a state of cheerful and unbroken repose.

Of such materials was the Supreme Court of Mississippi composed when I first beheld it in session. Of the members of the bar there convened I have some vivid and pleasant remembrances, which I will now as concisely as possible relate.

Robert J. Walker was at that time universally acknowledged to be, among the lawyers of the state then surviving, *facile princeps*. Of him I will speak more particularly hereafter.

Thomas B. Reid, William C. Griffith, and Robert H. Adams had, all of them, disappeared, only a year or two before, from that grand forensic theatre where they had, severally, acted so distinguished a part. Their names were still upon the lips of hundreds of those who had familiarly known them. Mr. Reid was acknowledged to have been profoundly versed in the mysteries of the common law, and to have been singularly familiar with the reported decisions both of this country and of England. He had a remarkable aptitude for the profession which he had adopted, and had been for many years known, both in Kentucky (his native state) and in Mississippi, to have been a very devoted student. In general learning he was deficient; he lacked fluency of expression, and never was known to attempt what is called forensic eloquence. His person

was large and commanding ; he dressed with much taste and elegance ; and his manners were marked with a loftiness bordering on hauteur, which impressed ordinary beholders with mingled awe and aversion. He was much admired and extolled by several of the younger members of the Natchez bar, one or two of whom were accused of imitating both his style of speaking and his somewhat ostentatious costume. During the short period that he occupied a seat in the United States senate he gained no little reputation, and one of his last speeches, upon what was called the judiciary question, was much commended in the newspapers of the time, and might yet be read with no little profit and entertainment.

Mr. Griffith was born in Maryland. He fell a victim to yellow fever in the summer of 1828 or 1829. He had enjoyed all the advantages which high birth, early association with persons of taste and refinement and a finished education could supply. He was a man of much and varied learning, had mastered the science of law in all its branches, and had become alike expert and ingenious in argument, and skilled in the mysteries of the art rhetorical, when he made his first appearance at Natchez, some fifty-five or sixty years ago. I am quite satisfied that he was, at the time of his decease, by far the most polished and fascinating speaker that a Mississippi audience had ever then heard. His face was full of benignity ; his gesticulation was most graceful ; and his voice was melody itself. He had, when thus suddenly cut off, accumulated a considerable fortune, had been married to a most beautiful, wealthy, and accomplished lady (the daughter of Judge Turner), and seemed to be in reach of the most wide-spread and lasting renown.

Robert H. Adams was, in some respects, one of the most remarkable men that this country has produced. Born in the valley of Virginia, of poor and obscure parents, he was bound apprentice to the cooper's trade, at which he is well known to have worked for several years subsequent to his reaching the years of manhood. His early education must, of necessity, have been exceedingly defective. By whom or by what circumstances his attention was first turned to the legal arena, I

have never been able to learn. Possibly an inward consciousness of superior native endowment may have, in this instance, as in so many others, supplied the needed *motive* power. It would be pleasing to know something of the budding hopes of such a rare original genius; to ascertain the primordial food upon which his eager mental appetite was nourished, and to learn that he was in some degree aided in his early studies by the counsels of some sympathizing and generous patron. But in regard to these matters we have been left entirely in the dark. He took his position at the bar of East Tennessee, so far as is now known, unfriended and undirected, at a time when it was supplied, as it ever has been for the last three-quarters of a century, with able and successful attorneys, many of whom have since reached civil positions of the highest dignity. Here he was able to secure a competent living, but his earnings were not sufficient to satisfy his soaring aspirations, and he determined to pass the Cumberland mountain range and try the chances of professional success in Nashville, then a promising village. Here he remained only long enough to obtain the means of journeying still further west, and he then came to Natchez, where he seems almost immediately to have attracted favorable notice and to have become recognized as one of the most astute and vigorous reasoners, as well as one of the most winning and impressive advocates that this city, so prolific in gifted men, had ever known. Robert H. Adams could never justly lay claim to be regarded as a man of erudition. It is doubtful whether he at any time acquired more than a smattering of any language save that vernacular tongue in the use of which he afterwards became so potential. It is certain that the lucubrations of Aristotle, of Quintillian, and of the other ancient masters of dialectics and of the art rhetorical, were ever to him as a sealed fountain. He has never been even suspected of looking with a critic's glance upon the wondrous classic writers of ancient Greece and Rome. Newton and Locke, Leibnitz and Descartes, Bacon and Hobbes, he had probably only heard spoken of. The best speeches of Demosthenes and Cicero he had doubtless perused in an Eng-

lish dress; and it is to be supposed that he had pored with delight over the imposing orations of Burke and Chatham, of Fox and Pitt, of Erskine and of Curran. With the history of his own country he is said to have become well acquainted, and often to have alluded to the great American statesmen and warriors of our own revolutionary era; but it is painful to reflect that his vigorous and elastic intellect had never received any regular and methodical training whatever, and that he had been thus far precluded from a thousand renowned sources of melioration and improvement, to which many minds of far inferior grade had enjoyed easy and unobstructed access. And yet it is certainly true that Robert H. Adams had, in some way or other, succeeded in impressing all those who had listened to his animated and persuasive addresses in court, with the conviction that he was indeed one of nature's most wonderful productions; that he was able to encounter any speaker of his time, and in a manner creditable to himself, upon any of the great questions which he was called to discuss; that he was an undoubted master of all the legal lore which he had occasion to adduce; that he could make a statement of facts in the hearing of the jury, in a manner so lucid, so concise, and, withal, so suggestive, as to render it impossible that the most adroit and artful adversary should be able to confuse or becloud them; that he could be as witty and amusing as the nature of the case which he had in hand would admit of; that he could be as bitterly sarcastic as if he had been all his life employed in learning the language of obloquy and denunciation; that he could talk when he pleased in the melting strains of heart-moving pathos, or thunder forth against some known offender such indignant tones of contempt and abhorrence as to compel the most hardened criminal to tremble before the picturings of his own enormity, and despair of longer holding in concealment from the eyes of mankind the dark secrets of a soul up to that moment confident of evading all scrutiny and of obviating all serious suspicion of iniquity. Most of those who knew Robert H. Adams well, undoubtedly adjudged him to possess more of native ability than any of his distinguished rivals for foren-

sic renown in Mississippi; and had he lived a few years longer, and used those means of intellectual culture which a seat in the national senate is well known to bring within reach, there is no knowing what amount of fame he might have acquired, or what wonders he would have achieved upon the theatre of national affairs. He was much beloved by all who held familiar intercourse with him, and he is believed to have departed from the the world leaving no enemy behind him.

After the almost contemporaneous demise of the three extraordinary personages I have just named, it has been already stated that Robert J. Walker became the acknowledged head of the Natchez bar. His elder brother, Duncan, had been for some years a resident of Natchez, when, on the elevation of his then professional partner, Judge Turner, to the bench, he invited Robert to leave his native state (Pennsylvania) and join him in the practice of law in Judge Turner's place. The education of Robert J. Walker was as complete as the schools of that period could supply. He had studied both the common and the civil law, with assiduity and success. He was said to have obtained in addition a diploma at the renowned medical college of Philadelphia. He was thoroughly versed in the Greek and Latin languages. He could both speak and write French with facility and elegance. He had given much attention to mathematical studies, and was quite a proficient in astronomy, chemistry, botany, geology, and mineralogy. He could write smooth and flowing verses in English, and was in early life much inclined to exercise himself in this way. He was the most untiring student I have ever known, and he had such a memory as few men besides himself have ever displayed. He could write off or dictate to an amanuensis a long speech upon any subject which had closely engaged his attention, and then repeat it *verbatim* without the aid of a single note. This wonderful fact is known to many thousands. Mr. Walker always made the most ample preparation for an argument in court, or for a speech elsewhere, and then often poured forth such a stream of ideas as were greatly entertaining and edifying, and often astonishing, to those who listened

to him. He possessed, as I have thought, no large amount of originality ; his imagination had been cultivated to the utmost, but its picturings were deficient in vividness and variety of coloring ; and his appeals to the passions were often feeble and ineffective. He always spoke and wrote with strict scholastic accuracy, and with a clearness and precision which might well defy criticism ; but he displayed on no occasion any remarkable felicity of diction, or such exquisite beauties of phraseology as to draw forth from persons of taste and sensibility expressions of special admiration and delight. He was possessed, perhaps, of as large a fund of learning of almost every description, as almost any man of his times ; but others, with far inferior attainments, have been able to effect far more than he can be supposed to have done, and have shown a capacity for persuading and commanding their fellow-men, far beyond anything which the history of Mr. Walker can be said to have brought to view. I do not recollect of ever hearing any important subject mentioned in Mr. Walker's hearing of which he seemed to be altogether ignorant ; but he did not always show off his information to the best advantage, and he sometimes appeared to impede the action of his intellect by constraining it to bear up under a larger mass of scientific facts than it was altogether capable of supporting. Mr. Walker was a man of strong and generous instincts ; of great simplicity and kindness of heart ; of a most charitable and confiding temper ; but he was far from being always judicious in the selection of his friends, or the recipients of his confidence. His person was well proportioned but decidedly diminutive ; his features were as delicate in their conformation, and as benign and playful in their expression as if he had himself belonged to the gentler sex. He is said to have had much personal comeliness when a child, as might well have been believed. His voice, in conversation, was, on all ordinary occasions, soft and even tender in its accents. In the delivery of a speech of much importance, there was in that voice something which I have never seen so strikingly displayed in any other instance ; its tones were either high and resounding or so low as scarcely to be heard ; the transitions of which



were alike sudden and extreme, without the least approach to the famous *os rotundum* so much lauded by Cicero. In listening, therefore, to a long speech from Mr. Walker, however cogent it might be in argument, rich with instruction, and varied in its topics, the ear became inevitably wearied with the constantly recurring iteration of sharply contrasted sounds. Mr. Walker would, I feel assured, have very greatly excelled as a law professor at some university, and on the bench he would have doubtless earned most extended and lasting fame.

Next to the two Walkers, Spence M. Grayson oftenest appeared at the bar of the Natchez courts in 1830. He was born either in Alabama or in Virginia; I believe that he was a descendant of that Grayson so well and favorably known in the early history of Virginia, and for several years a representative of that state in the Congress of the Union towards the close of the last century. Spence M. Grayson had been engaged in the practice of the law for some years at the period of my last seeing him. He was a fine-looking man of about thirty years of age; delighted not a little in the adornment of his person; was a plain, direct and sensible speaker; well informed in his profession; honest, industrious and pains-taking. He had many cases in his hands, was said to be making money rapidly, and had been just married to a most interesting lady with whom he seemed to enjoy much happiness. He died some thirty years since, leaving a wife and several children. One of these, a son, whom I once knew familiarly, became a married man about twenty years ago. He did not live happily with his wife, whom I saw in California in the year 1858. What was my surprise at learning a year or two ago, that this female was the same person who had been known so extensively since as the celebrated *Laura Fair*!

Robert H. Buckner was also a member of the bar of Natchez in the year 1830, and, as the partner of John H. McMurrin, enjoyed no little personal prosperity. He was a quiet and unobtrusive person, much given to the study of law books, and in truth reading little else at any time. He was an eminently safe and honest legal adviser, but excelled little as a forensic

speaker. He afterwards became chancellor of the state, in which office, though acquiring no extended fame, he commanded alike the respect of his brother attorneys and of the country at large.

Much was I entertained during my sojourn of a few weeks in Natchez with various learned and able arguments in court which I there heard, and not less, I may well say, with the pleasures of social intercourse to which I was there admitted. I shall have occasion hereafter to speak of several gentlemen whom I there met, and of whom I have not thus far made mention, but who stand honorably enrolled among the attorneys of Mississippi of a former generation.

Whilst making ready to leave Natchez, I fell into company, by accident, one morning, at the hotel where I was staying, with a young gentleman who at the very first sight impressed me with a deep and peculiar interest. He was apparently in delicate health, and was evidently suffering also from serious depression of spirits. He gave me some account of his personal history, which I found to be not a little tinged with romance, and marked with several incidents well calculated to awaken feelings of tenderest commiseration.

He had a special claim upon my sympathy by reason of the fact that he was, like myself, a native of Virginia, and a friendship at once sprang up between us which lasted, without the least abatement of kindness on either side, up to the period of his lamented decease, some seventeen or eighteen years ago. I refer now to Edward C. Wilkinson, a consummate scholar, an erudite lawyer, and an upright and pious gentleman. After having achieved much success in his profession, and after having surrounded himself with multitudes of friends and admirers, he became involved in a tragic affair in the city of Louisville, Kentucky, of most melancholy import, which resulted in his being tried for murder, amid the raging of a furious local excitement, and in his being, in the end, honorably acquitted. This case is one of marked celebrity, and in defence of Judge Wilkinson, S. S. Prentiss made, in association with the celebrated John A. Rowan, one of the ablest speeches of his life—in opposition to Benjamin Hardin, whose extraor-

dinary powers were most vehemently exerted in order to bring about a conviction.

Judge Wilkinson and myself traveled up the Mississippi river in company, in January, 1831, as far as Vicksburg, where he left me for Yazoo City, which was afterwards his place of residence for many years, and where his memory is yet profoundly respected. I remained in Vicksburg, where I labored for professional success for some years amid localities strangely marked with events of a startling and tragical character in after days. There I found many lawyers of decided ability, some of whom have since borne a distinguished part in the history of the country, but nearly all of whom have long since ceased to live.

I had not been in Vicksburg many days, when the innkeeper, in whose house I was staying, called my attention to a serious personal grievance which he had recently experienced, and for the redress of which he was disposed to appeal to judicial arbitrament. The mayor and common council of Vicksburg had passed an ordinance several months before for the closing of his hotel, on the alleged ground that a case or two of small pox had broken out among the inmates thereof. The hotel had been accordingly shut up, and, as mine host insisted, this had deprived him of a large amount of valuable custom. I was glad to have so early an opportunity of entering the field of litigious strife, under circumstances apparently so auspicious, and, accordingly, I lost no time in the commencement of an action for damages. The declaration filed in the case was responded to by a *general demurrer*, and the question was thus raised whether the corporate authorities of the city possessed adequate authority to adopt and enforce such an ordinance as the one complained of. Before the case came on to be argued, S. S. Prentiss, then a young and inexperienced lawyer, like myself, arrived in Vicksburg, with some intention of locating himself there. I invited him to aid me in the argument of the demurrer, which he very willingly agreed to do, and soon after did, in point of fact, make an argument of such extraordinary force and ingenuity, that he was immediately invited to become a member of a law firm

in Vicksburg of the highest rank there. Thenceforward Mr. Prentiss' forensic career was one of uninterrupted prosperity, and his reputation as an advocate continued to expand and display additional splendor, up to the end of his mortal career.

I shall venture here to repeat what I have thought proper to say of this remarkable person elsewhere. "About two years before I first saw Mr. Prentiss, he had landed at Natchez, as I repeatedly heard from his own lips, with a single dime in his pocket. He had, at the time, no acquaintance there, and had, as yet, not studied a profession. His college course had just been completed at an excellent institution in New England, and, being quite proficient in the several branches of learning to which he had been giving his attention, he determined to make an effort to obtain a small private school. In this he succeeded, and he followed this respectable vocation for a year or two, during which period he was applying himself with extreme diligence to the study of the law. The distinguished Robert J. Walker, then a lawyer in full practice, was kind enough to open his library to his eager and enquiring mind, and he was soon able to obtain license to practice in all the courts of the state of Mississippi.

"There was much that was remarkable in the appearance and bearing of Mr. Prentiss at this time. He was not more, I think, than five feet six and a half inches in height, and was very stoutly built, and well proportioned. His head was somewhat large when compared with his body; it was in truth a head that a Grecian artist might well desire to copy. His forehead was wide, high, almost semi-circular in its outline—so admirably were all the phrenological organs developed. His eyebrows were full, but not bushy, and were gently arched. His eyes were large and bright, and of an expression in which the absolute fearlessness of his nature was very happily blended with the rarest geniality of spirit, and the keenest relish for the ludicrous. He had but a moderate beard, and always kept his face cleanly shaven. His chest was one of uncommon expansiveness, and, though perfectly straight between the shoulders, a stranger approaching him from the rear could

not avoid being struck with the singular breadth and fullness of the whole tergal superficies. His nose was Grecian, and was both beautiful in shape and highly expressive. His upper lip was a little shorter than is customary, and of a flexibility I have never seen equalled. Often was he seen to curl it up, both in mirth and in anger, displaying to view a row of strong, well-set, and beautifully white teeth. He had all his life suffered from a lameness in one of his feet—suggesting to the historic beholder, a similar pedal blemish, alike in Agesilaus and in Byron—and he was said to have a good deal of sensitiveness as to this matter, though if such was the case, I never was able to discover it. He hobbled, of course, very perceptibly in his gait, and would, I conjecture, have found it difficult to walk at all without the aid of a large stick which was his perpetual attendant. When I was introduced to him forty-two years ago, Natchez was already full of his fame. He had delivered several speeches at the bar, which all admitted never to have been equalled there, either in vigor of argument, brilliancy of expression, or rich and flowing facetiousness. Though exceedingly modest by nature, yet the signal forensic triumphs which he had already achieved over men of established reputation, had inspired him with a manly confidence in his own powers, which could not but be more or less apparent, both in his aspect and demeanor, and alike amid the discussions of the forum and in ordinary converse. I was talking only a short time since with the Hon. Joseph Holt, in reference to his former illustrious rival in oratory at the Mississippi bar, and was not at all surprised to find that his opinion of Mr. Prentiss' extraordinary powers was altogether in harmony with my own. I have been long satisfied that in regard to all the faculties and graces which constitute the veritable orator, Sargent S. Prentiss was equal to any man of modern times, and such is my estimate of him in this respect that I should distrust either the judgment or sincerity of any one who, after having once listened to him in a case calculated to bring his remarkable abilities into full display, should express a different opinion. At times he was indeed most electrical in his utterances, reminding one at all versed in Hebraic

lore, of the soul-thrilling strains of an Isaiah or an Ezekiel; whilst, on other occasions, yet well remembered by many still living, his wondrous harangues imparted credibility to all the gorgeous, and, perchance, over-wrought descriptions which we have read in relation to the majestic thunderings of a Pericles or a Henry, or of the soul-dissolving pathos of a Somerfield or a Maffet. I was not at all surprised to see it published in the newspapers of Boston many years ago, on the occasion of Mr. Prentiss' visit to that city for the first time, that even in the midst of that memorable dinner-speech which he was then delivering, Mr. Webster and Mr. Everett, with eyes overflowing under his magic enunciations, were heard generously whispering to each other, 'We have never heard such eloquence as this before.'"

Whilst all who have had the good fortune to hear Mr. Prentiss speak in court will, I am sure, agree with me in the opinion that he was very superior to most of those with whom he came in contact in the management and discussion of causes, both on the civil and criminal side of the docket, it seems to have been generally thought that his grandest manifestations of the peculiar powers of the *advocate*, as distinguished from mere *logical analysis*, occurred in the prosecution and defence of persons charged with criminal offences. Such certainly is the conclusion to which I have myself arrived, after much reflection, and after much consultation with others. Whether his powers of persuasion were more fully put in requisition in vindicating the innocent against unjust and virulent assaillment, or in the bringing of great offenders to justice, it would be difficult to decide; for he seemed, in cases of every description, to be entirely equal to the exigencies of the occasion arising, and he most generally succeeded in surpassing the expectations of all who came to listen to him. I should, though with some hesitation, decide that his speech in prosecution of Alonzo Phelps, and that against Mercer Byrd were his forensic master-pieces.\* "I chanced to be enlisted in the defence both of Phelps and Byrd, and had, therefore, a most favorable opportunity of appreciating the

\* *Vide* Casket of Reminiscences.

power displayed on the part of the prosecution. Alonzo Phelps was a native of New England. According to his own account of himself, he had, in a fit of jealousy, slain a rival lover in his native vicinage, secreted the body of his victim in a neighboring mill-pond, and fled to the valley of the Mississippi. He had here been a wanderer for many years, seldom entering any human habitation, and subsisting meanwhile altogether upon the raw meat of squirrels and other wild animals which he had captured in the chase. He had long infested the banks of the Mississippi; had committed eight murders and more than sixty robberies, and had some dozen times broken jail and evaded the punishment of the law. Strange to say, he was a ripe and accurate scholar, and when taken prisoner, a few weeks subsequent to the perpetration of his last murder, had, as I personally know, a much-worn pocket-copy of Horace in his possession, which he was able to read with much more facility than our ordinary college graduates would be likely to evince, and with a far keener relish for the quiet and unpretending beauties of the poetic friend and *protegee* of the great Macænas than Lord Byron reports himself to have at any time felt. The trial of Phelps had attracted to the Vicksburg court-house a vast assemblage of excited citizens. Judge Montgomery, an able and learned functionary, who, I am glad to know, is still living, presided on the occasion. I was aided in the defence of the prisoner by two very accomplished and able gentlemen, John Gildart, Esq., of Woodville, and Mr. Pelton, then a resident of Natchez, but now a wealthy sugar planter of Louisiana, and a most worthy and interesting person. General Felix Huston and several other attorneys of rank, co-operated with Mr. Prentiss and the district attorney in furtherance of the prosecution. The speech delivered by Mr. Prentiss would have enhanced the fame of an Erskine, a McIntosh, or a Curran. His delineation of the character of the accused was, indeed, most masterly, in the course of which he bestowed upon him the imperishable cognomen of 'The Rob Roy of the Mississippi,' in allusion to his having habitually, year after year, levied 'black mail' upon the unhappy travelers whom he had, from time to

time, encountered on the highways along the banks of the great river; hundreds of whom he had despoiled, and some of them under circumstances both romantic and ludicrous. Phelps had been, of course, relieved of his irons before being brought into court for trial, but it had been deemed expedient to surround him with an armed guard. His appearance on the occasion was very striking and impressive. He was a muscular, well-shaped man, about five feet eleven inches in height, and evidently possessed of great vigor and activity. He had a particularly fair complexion, though somewhat bronzed and freckled from constant exposure to the damp air of the river bank and the torrid rays of a southern sun. His hair was blood-red, and was much inclined to curl up in knots, and his crispy, snakelike locks stood stiffly up over and about his cranium, with a singularly fierce and menacing aspect. His keen gray eyes exhibited a curious blending of audacity and furtiveness. Prentiss' speech galled and irritated him greatly. When the orator was depicting the enormous and shameless criminality of the culprit, and most fiercely looked him full in the face, with a most withering look of scorn and indignation, I saw the muscles of this hardened criminal quiver with convulsive agony; and seeming presently to grow desperate, he bent forward a little and whispered in my ear: 'Tell me whether I stand any chance of acquittal, and tell me frankly; for if my case is hopeless, I will snatch a gun from the guard nearest me and send Mr. Prentiss to hell before I shall myself go there.' Never was I more embarrassed in my life. I saw that my robbing and murdering client was in dead earnest. I did not doubt that at this moment Mr. Prentiss was fully in his power. If he should slay him, he would deprive of life one whom I could not help loving and admiring much, despite the unkind relations then existing between us. Were Prentiss assassinated by the hands of this fiendish ruffian, immediately, too, after this whispering intercourse with me, who, of all that vast crowd, would hold me guiltless? I may have been wrong, but frankness constrains me to confess that I whispered back to Phelps, 'you are not in the least danger; we shall have no difficulty what-



ever in preventing your conviction, and shall presently introduce a motion for a new trial, or in arrest of judgment, which will save you from all further annoyance."

The jury in a few moments brought in a verdict of "guilty," as they could not avoid doing without the commission of the most shameless perjury; and Phelps escaped being hung upon the scaffold only by breaking jail and endeavoring to fly towards the river bank, in the attempt to do which he was shot down by the sheriff of the county, a most resolute and faithful officer.

I have more than once had occasion to declare that I have myself heard only one man whom, as an advocate in criminal causes of difficulty, I should think of comparing to Mr. Prentiss; and of the gentleman thus alluded to, I purpose to take somewhat more than a mere passing notice.

It was in the autumn of 1837 that the renowned Joseph Holt first made his appearance in the state of Mississippi. On his arriving among us, in the central portion of the state, he quickly ascertained that his fame as an orator of the sound democratic creed of the ancient time, had preceded him, for the eloquent harangue which he was reported to have delivered in the national Democratic convention of the previous summer, in support of the nomination of Richard M. Johnson for the vice presidency, had been read with mingled surprise and rapture in every nook and corner of the land, and Mr. Holt had already become a great popular favorite everywhere, and especially among the appreciative and enthusiastic inhabitants of the rapidly advancing southwest. Such a reception was now accorded to him in the neighborhood of the Mississippi capital as must have been both surprising and gratifying to him, though he met the cordial greetings of his new-found friends with a bland and unassuming courtesy in which there was not a particle of weak-minded exultation or self-sufficient vanity. It was at that time whispered about among those who had known him in Kentucky that he had recently been the recipient there of a rare, and, perhaps, unprecedented personal compliment at the hands of the governor of that commonwealth, who had, in a very cour-

teous and respectful manner declined re-appointing him to the office of district-attorney which he had for several years filled with distinguished credit, on the ground that his powers as a prosecutor were such as, when fully exerted against an ordinary citizen charged with crime, rendered acquittal well nigh an impossibility. However this may have been, there certainly was nothing in the countenance or manner of Mr. Holt to indicate undue severity of temper or to suggest the idea that he could be induced either by venality or exorbitant personal ambition to give an over rigorous and oppressive operation to the criminal law, or to disregard the claims of humanity.

It has been elsewhere said by the writer of this article, that Mr. Holt, on becoming domiciliated in Mississippi, "lost no time in entering upon the brilliant forensic career now opening before him;" and that, "by an extraordinary display of professional diligence, as well as by giving constant evidence of ability, he succeeded in the short space of four or five years, in accumulating an estate larger than is seen to reward the labors of most lawyers in a life-time. In the argument of causes of the greatest dignity and importance, he was never known to put on a dogmatical or assuming manner, never seemed to forget the proprieties of his position, or indulged, to the least extent, in unseemly affectation or triviality. He always, when engaged in the duties of his vocation, had an air of serenity and mildness (not as common at the bar as it should be), and his then pale and somewhat sallow face was a little shaded by what seemed to be an expression of sadness; the tones of his voice, when he was not under the influence of some very strong and sudden emotion, were inexpressibly soft and touching, and, as he advanced from point to point of his never flagging discourse to court or jury, he became so marvellously fascinating to his enraptured audience that few who heard the opening sentences of his exordium, were able to tear themselves away from the scene until the closing words of his ever animated and fervid peroration had been pronounced. He indulged less than any speaker I have known in studied gesture or attempts at stage effect, and scarcely ever was known to withdraw his thoughtful and earn-

est gaze from the countenances of those whom he was addressing, for a single instant; and, strange to say, no one ever saw him, on any occasion, cast a glance of *inquiry* towards the surrounding audience, as if in quest of the wished-for signs of approval—now, alas, so customary. It was most evident that Mr. Holt was, even then, a well-read lawyer, and the style in which he expressed himself, either to judge or jury, bore evident marks of the highest literary culture."

The first of the speeches made by him after his arrival in Mississippi that attracted any very particular attention, was one which he delivered in the court-house at Vicksburg, in certainly as remarkable a case as has ever been tried. An elderly individual by the name of Herring, and who had been for many years an extensive negro-trader, was charged with having murdered his own son, and the district attorney being much indisposed at the time, Mr. Holt was induced to give what aid he might choose to contribute towards bringing the alleged offender to justice. The affair had aroused the most intense interest in the community, and opinions were somewhat conflicting touching the guilt or innocence of the accused. Herring was quite a large cultivator of cotton, and divided his time between his residence in the country and one which he owned in town. His son, then almost of mature years, lived with him at his town mansion. It appeared that unpleasant, if not hostile feelings, had sprung up between father and son in connection with a colored mistress of the former, for whom he suspected his son of having become too partial. Herring, the elder, was a very free consumer of intoxicating liquids, and was generally, especially towards the winding up of the day, more or less under the influence of Bacchus. One evening, about twilight, the neighbors round about the Herring domicile were startled by the sound of a pistol, which had apparently been fired off in Herring's back yard. Many rushed to the spot for the purpose of ascertaining what had caused so unusual an occurrence, and several individuals, on entering the house, found young Herring bleeding profusely, and lying motionless upon the ground. Upon examining the body, a gun-shot wound was found, from which the blood

was still flowing freely, and in a few seconds the young man was no more. His father presented himself to view, but in response to the inquiries propounded to him, he said that a stranger had suddenly entered the premises, and, after firing at his son, had fled. This story was so confused and his manner so marked with embarrassment—wholly unmixed with paternal sympathy—as at once to awaken suspicions of guilt. It was noted as a striking fact, too, that he was altogether unable to describe the stranger, of whom he had spoken, or to explain in what manner he had entered the lot or made his escape. He could not even state in what direction he had fled. Those present resolved to search the house, and when doing so, found, on entering Herring's chamber, that some one had deposited a pistol there, under the pillow that lay at the head of the bed in which he usually slept. The pistol was yet warm, as if it had just been fired off. There was another shocking fact in the case: before the departure of the crowd, Herring coldly requested one of those present to have the body of his son interred—stating that he would be answerable for the burial expenses, and enquired, in addition, whether there would be any impropriety in his being present at the funeral ceremonial!

He denied most vehemently and persistently that he was the slayer of his son, and seemed to have but little apprehension as to the result of any legal proceedings which might be instituted. He gave bail for his appearance at court to undergo trial. Before the case came on to be tried, the excitement occasioned by the killing to some extent subsided, and as Herring was a man of wealth, and could afford to pay large fees to lawyers, and, possibly, even suborn witnesses, should this become necessary, there were not a few who supposed that his acquittal was at least a possible occurrence.

When the trial took place, and no testimony in addition to that which has been specified had been yet adduced, both Herring and his counsel appeared to be confident of an easy acquittal. The fact was unknown to them that another witness was yet to be brought forward who would be able to give evidence against the accused of a most conclusive character.

And now did this witness appear in court. There lived at the time, in a house adjoining Herring's, a woman who was in a very low state of health, and who seldom rose from the bed on which she was expecting soon to die. On the night of the murder, the weather was very sultry and enfeebling, and she made an effort to rise up and creep into the veranda of her house, in order to snatch a few breaths of fresh air. She had barely reached the threshold of her own door, when she heard the report of the pistol in Herring's enclosure, followed immediately by the exclamation: "*Oh father! you have shot me!*" To these words there was no reply; and this woman was the only human being, except Herring himself, near enough to hear the last words of the dying man. When all the other witnesses had been examined, as has been already mentioned, this female, to all appearance on the edge of the grave, was borne into the court on the arms of her friends, and detailed the facts of which she was cognizant, with a clearness and impressive solemnity which could leave no doubt upon the mind of any in the vast concourse there assembled, that the "*father,*" whom, amidst the deepening shadows of that terrible night, she had heard addressed by his dying boy, in words of such damning accusation, could not possibly be any other person than the ruffianly and unrepentant prisoner then awaiting the just punishment of a cruelly violated law.

After what I have already said of Mr. Holt's powers as an advocate, I may well leave it to the imagination of the reader to body forth the speech which he was likely to enunciate upon such an occasion as I have described. That speech I have often heard alluded to by those who heard it, all of whom united in declaring it to have equalled, and even surpassed all the conceptions they had previously formed of the electrifying force of human eloquence. The glowing and overwhelming peroration is yet vividly recollected by hundreds, in which he compared the aged and hardened monster, whom he was there struggling to subject to the exemplary punishment of the law, to *Nero* as delineated by the pen of Tacitus—swollen and brutified by long-continued sensual indulgence—with a heart accustomed to crime and ob-

livious alike of the sacred obligations of filial duty and the all needful decencies of social life—gazing with those blood-shotten and cruel eyes of his upon the face of that now mute and voiceless mother whom he had just caused to be stealthily murdered—and, with more than Mephistophelic sneerfulness of tone and visage, coldly commending that *comeliness of person* once imputed to *her*, who, in days now past and gone, had given nourishment to his own feeble infancy from that now marble and pulseless bosom;— or when, as he could not help even yet remembering, his ears had drunk in with delight the tender whisperings of maternal affection, or his yet guileless and uncorrupted heart had gladdened in that smile which had now given way to the clayey and expressionless aspect which it is death's alone to impart, ere yet his cold

defacing fingers

On           Have swept the lines where beauty lingers,  
               That first dark day of *nothingness*,  
               The last of danger and distress.

I have spoken of Mr. Holt and Mr. Prentiss as having been *rivals* at the bar of Mississippi, and so, indeed, in a certain sense they were; for they were both eager and ambitious strugglers for professional fame upon the same attractive theatre; they were both surrounded by numerous applauding friends and admirers; comparisons between them were often instituted; and repeatedly did they meet in earnest conflict in the various courts of the state. I am not aware that either of these gentlemen ever displayed feelings of illiberal jealousy towards his accustomed opponent, or was heard to apply to him the language of decrual or disparagement; though there is no reason to believe that they were ever upon terms of personal intimacy. In truth they differed so much from each other in disposition, in habits of life, as well as in political opinions, that it would have been almost impossible that they could have lived together in the same vicinage without being in some degree accessible to occasional feelings of unkindness, or at least of estrangement. The most noted civil case by far in which I ever knew them to be arrayed against each other was that of "Vick and Rappeleye v. The Mayor and

"Aldermen of Vicksburg." This case involved a large amount of property, and had awakened much local feeling. In it Mr. Prentiss had a large contingent fee depending, supposed to be as much in value as several hundred thousand dollars, and he was, of course, particularly anxious to succeed. He had never been known to make such elaborate preparation in any case besides. There was much ground for contestation, both as to facts and law, and the interesting question of "*dedication*," as it is called, which has arisen so often in connection with our rising towns and cities within the last half century (the doctrine appertaining to which is perhaps not altogether settled), underwent, on this occasion, a most laborious and searching examination. The copious and learned briefs filed in this case, and which are to be found in the volumes of reports of that period, may be yet read with interest and instruction. It was, indeed, a battle of giants, and its progress was observed with intense interest by many not personally connected with the controversy. Mr. Prentiss and Mr. Holt were, of course, the Achilles and Hector of the scene, though several other attorneys participated to some extent in the struggle in a manner highly creditable to them. Mr. Prentiss was successful before the Supreme Court of Mississippi, but the decision of that tribunal was afterwards reversed in the Supreme Court of the Union, and Mr. Prentiss lost his expected fee. In the condition of his pecuniary affairs at that period, this was, indeed, a severe blow, but he bore up under the disastrous result with manly dignity, and was seldom heard to complain of his ill-fortune. A year or two after, he removed to the city of New Orleans, where he did not long survive. Mr. Holt, about the same time, owing to continued ill-health, withdrew from the regular practice of his profession; travelled much in foreign lands; returned; was called to occupy a respectable official position in Washington City; has been long there since, in the discharge of duties involving serious and delicate responsibilities; has been in the meantime the subject of much commendation and of much dispraise, according to the prejudices and partialities of men of opposing political factions; and still survives in the full possession of his faculties, and in far more robust physical

health than when he first made his appearance in the state of Mississippi, almost forty years ago.

In the year 1830 the state of Mississippi was one of the least populous in the Union, though, as I have said already, there was much wealth there, much intelligence, and much enterprise. The Choctaw and Chickasaw Indians had not yet relinquished their primeval homes and gone to reside beyond the great "Father of Waters." When this grand exodus occurred, a few years later, an almost unprecedented tide of population flowed to Mississippi from other states, and from beyond the ocean; and the most remarkable influx of lawyers also took place, which has been ever known in this country. These came chiefly from Tennessee, Kentucky, Virginia, Georgia, Alabama, Maryland, New York and New Jersey. Many of them were persons of much intelligence and worth, and of no little standing and influence in the states whence they had migrated. Of a number of them I shall have much to say hereafter, both as barristers and as occupants of the bench; and there are likewise a considerable number of those who were residents of the state at a much earlier period, and well-known in connection with the legal profession, whose merits will be hereafter noticed, should these numbers be continued.

I propose to close the present article with some remarks upon one of the new-comers of that period from the state of Kentucky, with whom it was my happiness to enjoy for many years relations of the closest intimacy, and of whom thousands yet surviving cherish the most pleasant and respectful remembrance. I allude to the Hon. Daniel Mayes.

Judge Mayes, if I have not been the recipient of erroneous information concerning this matter, first saw the light in Kentucky. It is certain that he studied his profession in that state and practiced there for many years previous to his coming to the state of Mississippi. He came to his new home in the Southwest with a high reputation for legal learning and ability, and was known by many among us as having officiated most creditably as a law professor at the Transylvania University. Many of those who had sat under his sage minis-



trations at this famous institution, had preceded Judge Mayes in his advent to this inviting theatre, and had been everywhere heard to speak of their revered preceptor in terms of glowing and grateful commendation.

This gentleman, after a calm survey of the field of professional labor upon which he was about to enter, concluded to open an office in the city of Jackson. His merits were not slow in being discovered in this locality, nor did he have to wait long before he became enlisted in many cases of much interest and complexity, in all of which he more than equalled the public expectation. He at once showed himself to have mastered every branch of the law, and to be fitted, in every respect, for the competition in which he was now to engage. As a special pleader, I do not suppose that he had, in the whole state of Mississippi, an equal. He was a smooth and graceful speaker; an adroit and skilful logician; was of most gentle and conciliatory manners, and of a patient and persevering energy which no difficulties could baffle, no embarrassments could perplex, no amount of professional labor could fatigue or discourage. As a forensic speaker he was always calm, strictly methodical in the arrangement of his matter; terse, vigorous, and pointed in his phraseology, and singularly accurate and felicitous in his choice of words. He has the credit of having made one of the most effective speeches of his life in the celebrated Beauchamp case in Kentucky, and this I am myself not at all inclined to doubt; since I have heard from his own lips, that he exerted himself on that occasion far beyond what was customary with him. Judge Mayes was in general cheerful and fond of social intercourse, but suffered from occasional fits of despondency, arising, as he thought, from physical causes, which rendered him at times a little gloomy and morose, and induced him to avoid all company save that of his own quiet and beloved home. In the contests of the forum he was never captious or impolite; never coarsely boisterous; never in the least degree dogmatic or egotistical. He constantly evinced the nicest sense of professional propriety; was never known to be unduly punctilious or exacting, and never took an unseemly personal liberty; but if his own sensibilities

were gratuitously assailed, or he was treated with marked incivility by an adversary, he was far from being slow in the emphatic assertion of his own dignity and in compelling the aggressor to lament his own temerity.

Judge Mayes was assuredly one of the most acceptable and useful forensic allies that could be wished for: he was ready to take upon himself any amount of labor that the exigencies of the case in which he chanced to be employed might seem to demand; was perfectly frank in the disclosure of such views as he had adopted, *in advance of the expected argument*, and in all causes seriously involving life, reputation or fortune, his active and suggestive mind was ever on the alert, in the devising of new expedients for the furtherance of his client's interests, in finding out new avenues of escape from unfavorable presumptions of any kind, in casting new difficulties in the way of opposing counsel, or in the framing of subtle and ingenious interpretations of some disputed fact, or of some ambiguous provision of law applicable to the case under investigation.

I am here to invite attention to several interesting criminal trials in which I recollect this remarkable personage to have taken part, and in which his skill and ability were brought forth in a particularly striking manner.

A man of very humble social standing by the name of Dunn, and who resided in the southern portion of the county in which Judge Mayes himself lived, stood charged with the murder of a female, under most peculiar circumstances. The accused individual had previously sustained an irreproachable character for industry, sobriety and amiableness of temper. He had never been known to wrangle with his neighbors, was just and upright in all his dealings, was kind and exemplary in domestic life, and was not known to have an enemy in the world. He lived in a neat and comfortable cottage, on a much-travelled road, and occasionally entertained persons who chanced to call upon him for such accommodations as his humble mansion could supply. A female stopped at his gate one day, of genteel appearance, having two children in her arms—and asked for admission, which was of course not refused her, as she

stated that her husband would join her in a day or two, he having gone upon a short journey. The children were twins, and were, at the time, apparently only about a month or two old. The woman was herself quite good looking, but was almost a giantess in dimensions. Several months rolled away, and no husband yet made his appearance. Dunn and his wife were in quite an embarrassing predicament. They did not wish to turn the woman out of doors, but she had as yet paid them not a cent for her board, and they were too poor to allow her to remain with them without some prospect of remuneration. Mrs. Dunn, who appeared to be an amiable person, and in very delicate health, concluded that she would name the matter to her mysterious boarder, and, if she found that she could pay nothing for the entertainment she was receiving, to request of her, civilly, to leave her house. This she did accordingly, when the female in question flew into a violent rage, and used the most insulting language, rushed out of doors, and, seizing a large wooden trough which she found lying in the yard, came back to the house with it, and holding it aloft in both her hands, was in the very act of striking Mrs. Dunn with it, when Mr. Dunn himself (having been drawn from the shop, where he was working, by the loud and angry words which had been uttered), struck the assailing party with the butt-end of a whip which he chanced to hold in his hands at the time, and felled her to the earth; *where she immediately died!* A *post mortem* examination was immediately had, from which it appeared that the head of this unfortunate female had received some injury in the region of the temple, but that the skull had not been at all fractured. The surgeon conducting the examination declared that the death had been caused by the sudden bursting of an artery; but whether this bursting of the artery had been the effect of a sudden rushing of blood to the head produced by a violent fit of anger, or had been either wholly or in part the result of the blow which had been struck, he was not prepared to say. The neighbors who gathered to the spot where this fearful disaster had occurred, found Dunn and his wife in tears and in an agony of grief; the dead body of the unfortunate woman

lying upon the ground where she had fallen, and her twin children clinging to her bosom to obtain the nourishment which they had been accustomed to receive therefrom. A more piteous spectacle than this was hardly to be imagined. Dunn set off immediately for the city of Jackson in order to obtain professional advice as to the course which it would be best for him to pursue under these alarming circumstances. Here he was counselled to surrender himself at once to the civil authorities, which he did, and gave bail for his appearance at the circuit court of the county, which was in a few days to be held.

When the day of trial came on, Judge Mayes and the counsel associated with him in defence of Dunn, came to the conclusion that he could not possibly escape conviction for murder, unless his daughter, a little girl about ten years old, who had witnessed the scene just detailed, could be used as a witness in his behalf. She had seen and heard all that had taken place, and, being of far more than ordinary intelligence, might be able to give such an explanation of facts as would save her father's life. Judge Mayes, with that astuteness which was one of his most striking characteristics, advised that the case should be continued until the next term of the court, and that, meanwhile, the little girl should be sent to a good school, and taught especially the *responsibility* attached to the oath which she was expected to take. This course was accordingly pursued. When at last the trial came on, and the little girl was produced in court, the wisdom of the course which had been pursued became most manifest; for, not only did our young *novitiate* stand nobly all the tests of her competency to which the representative of the state subjected her, but she gave such a sensible and lucid statement of all the particulars of this sad occurrence as almost entirely to justify her father in what he had done, in order to save his wife from the serious bodily injury with which she was obviously menaced.

The speech made by Judge Mayes in defence of Dunn was extolled by all who heard it as a marvellous combination of ingenious and forcible argument, winning and pathetic elo-

quence, and lucid exposition of the law. Dunn was convicted of *manslaughter*, and, after a short confinement, was released from prison and restored to the society of his family; but this unfortunate affair clouded the remainder of his life with sorrow, and he was never seen, as I learn, again to enjoy that serenity and cheerfulness for which he had been once remarkable.

A case of at least equal interest and of much greater difficulty was not long after tried in the county of Rankin, whither it had been removed by change of venue, in the management of which Judge Mayes prominently participated, and in which he gained much additional reputation. At a time of severe pecuniary pressure, a Mr. Pigg, having become surety for a neighbor, was sued and a judgment obtained against him in the Circuit Court of the United States, for more than the value of all the property he owned in the world. He had a large and helpless family, chiefly composed of a wife and some half-dozen small children. His own health was not good; he had, in fact, suffered much from a serious contusion of his skull, received in one of the famed battles fought in the winter of 1815, in defence of the city of New Orleans. He was a very industrious, hard-working man, and was a most devoted husband and father. He had, latterly, taken to drink, and when at all under the influence of alcoholic stimulus, was very irritable, and not a little pugnacious. His character in other respects was unexceptionable. A deputy federal marshal had recently visited his house, and levied an execution on all he possessed, which he was informed would, in a few days, be sold. The wretched man was in a state of despair. He had some angry words with the deputy marshal, and he vowed to him that he would never submit to have his family turned out to starve. The marshal, in turn, used some insulting and acrimonious words which rankled in the sensibilities of Pigg after the termination of their interview. On the day fixed for the sale of Pigg's goods, an announcement was made to him that the marshal was at the door. Pigg, in a condition of mind easier to be imagined than described, seized his gun, rushed to the door, and fired upon

the officer whom he found standing there, and killed him. So soon as this fatal act had occurred, it was ascertained that the person who had been shot was not the officer with whom he had previously quarrelled, but another individual altogether, who had been sent in his place, and who had been up to that time, wholly unknown to Pigg. When this mistake of persons was made known to the unhappy man, he burst into tears, and could scarcely be prevented from taking his own life.

This was the precise character of the case in which Judge Mayes was now called upon to exert his high powers in order to save a fellow-being from an ignominious death upon the scaffold, and an innocent and interesting family from penury and degradation. He came to the conclusion, after consulting with associate counsel, that it would be possible to defend Pigg successfully upon the ground that when he committed the act of killing, he was not in a state of *sanity*, but *non compos mentis*. I do not suppose that more extraordinary pains were ever taken than were now put in use in order to make out, if possible, this difficult species of defence. Judge Mayes argued the case, when the day of trial came, at much length, with infinite earnestness, and with more even than his wonted address and plausibility. To the jury, which was one of uncommon intelligence, he explained in the most lucid manner the complex organization of the human brain, and the various causes by which it was subject to be injuriously affected. He drew illustrations from Locke, from Spurzheim, from Comb and other writers of profundity. He read copious extracts from the standard works on medical jurisprudence, and applied them all most felicitously to the case under trial. He quoted a paragraph or two from Erskine's celebrated speech in defence of Hadfield. He urged most warmly and earnestly that the defence of *insanity* had been fully made out. He then took a view of the defendant's previous good character; enlarged upon his many good qualities, his kindness of heart, his valorous and patriotic conduct in defending his country against a foreign invading army; insisting that the grievous responsibilities which he was now called upon to meet were

the result of injuries received in that country's service; and wound up with a pathetic and soul-moving appeal to the jury in behalf of his unhappy family, several of whom he pointed out as then in court awaiting the result of the trial. The defendant was not convicted of murder; but the jury, under such instructions as they received from the court, could not avoid finding him guilty of manslaughter.

Here I will for the present cease to occupy the attention of the readers of the SOUTHERN LAW REVIEW. Should this attempt to amuse them be at all successful, it is not improbable they may hear from me again; meanwhile, I may say to them, one and all, in relation to these hasty and somewhat *experimental* lucubrations, in the language of modern poesy:

"If in your memories dwell  
A thought which once was mine, if on ye swell  
A single recollection, not in vain  
I've worn my sandal shoon, and scallop-shell;  
Farewell! with *me* alone may test the pain,  
If such there were—with you the *moral* of my strain."

H. S. FOOTE.

NASHVILLE, TENN.

## VI. *THE LEGAL ASPECTS OF THE GREAT CRIM. CON. CASE.*

On the threshold of the year 1871, were heard murmurings of self-dismemberment from Plymouth Church. One who, for fifteen years had participated in its rites and sacraments suddenly absented himself from it forever. The officials of the church, and people cognizant of the fact, began to question among themselves the meaning of the act—the significance of the cloud-vision which portended calamity. Some said—It is caused by the gloomy forebodings of a disappointed mind, an over-weening, fettered and corrupt ambition;—others said, Nay, it is the doleful wail of one who has been deceived by the insidious wiles of an unfaithful friend. Time rolled on, while yet the dull lachrymal cloud held its wonted altitude and continued to augment.

On the twentieth of May, 1871, a card appeared in the *World* newspaper, over the name of Mrs. Woodhull, containing this remarkable allegation: "I know of one man, a public teacher of eminence, who lives in concubinage with the wife of another public teacher of almost equal eminence." Meanwhile the people's visual ray discerned, or seemed to discern, a reason for that mysterious cloud-vision, and the Argus-eyed press on its ubiquitous wings messengered tidings of suspicion to the uttermost parts of Christendom.

That publication tended to open afresh the scandal, and the public mind became restive and curious. For a time the matter was resolved into a kind of quiet. But in the month of November, 1872, there appeared in the *Woodhull and Claflin Weekly*, an extended article in which the averments formerly published in the *World*, were elaborated into general and specific charges of criminality between Mr. Beecher and Mrs. Tilton. This announcement resounded like a thunder-bolt at midnight. No notice was taken of it by the church



proper, although the article was largely commented upon by the press of the country.

Months passed on, and in the latter part of May, 1873, a tripartite covenant appeared in the Brooklyn Eagle, purporting to have been signed by Mr. Bowen of the Independent, Mr. Beecher and Mr. Tilton. This, it is said, was surreptitiously published. A card appeared in that paper a few days later (June 1, 1873), from Mr. Beecher, saying, if that document should lead people to regard Theodore Tilton as the author of the calumnies to which it alluded, it would do him great injustice.

In the early spring of 1874, the Congregational Church at large had considered the matter thus presented, and deemed it wise and for the best good and purity of the church, that a council be held in Brooklyn to the ostensible end of instituting an enquiry into the justification of the act of Plymouth Church in striking from its roll of membership the name of Mr. Tilton, without a regular and formal dismissal. The council being convened, Rev. Dr. Leonard Bacon, the distinguished New England clergyman, was chosen its moderator. In due time Plymouth Church was cited to appear and explain its course. A response thereto was received by the council from that church, saying: "We hold that it is our right, and may be our duty, to avoid the evils incident to a public explanation or a public trial; and that such an exercise of our discretion furnishes us no good ground for the interference of other churches, provided we neither retain within our fellowship, nor dismiss by letter, as in regular standing, persons who bring open dishonor upon the Christian name."

It seems that, prior to this time, charges had been preferred against Mr. Tilton by certain members of the church, requiring him to attend and answer for having slandered the pastor. In response thereto Mr. Tilton indicated that he was ready to meet any charges, only asking that they be made with open doors, and Mr. Beecher present. No hearing was had, but a report seems to have been presented at a church meeting, which stated in effect that Mr. Tilton had been charged with slandering the pastor, and had been cited to appear, and as he

had pleaded non-membership as the excuse, it was resolved that "his name be stricken from the roll." Upon these facts coming to the knowledge of Mr. Tilton, on the 31st of October, 1873, he appeared at a meeting of the church in presence of Mr. Beecher, and stated that if he had said aught of untruth against the pastor, he would answer it, whereupon Mr. Beecher replied that he had no charge whatever to make against him.

The congregational council having adjourned without taking further action in the premises, a few weeks afterward certain articles appeared in the Independent, over the name of the Rev. Dr. Bacon, severely criticising Mr. Tilton for his course toward the Plymouth pastor. The ex-moderator took occasion to observe that, "It was for Plymouth church to vindicate its pastor from a damaging imputation from one of its members. But with great alacrity, the pastor himself consenting, it threw away the opportunity of vindication." And that this action of the church gave rise to remonstrances from neighboring churches.

These several letters of the Rev. Doctor Bacon to the Independent, coming to the knowledge of Mr. Tilton, to remove the suspicion that he had avoided answering complaints, as he avers, on the 4th of May, 1874, he addressed an open letter to "The Rev. Henry Ward Beecher, pastor of Plymouth Church; Rev. S. B. Halliday, associate pastor, and Thomas G. Shearman, Clerk, in which he said:

The moderator's declaration is thus made three times over that the Plymouth Church, in dealing with my case, **THREW AWAY ITS OPPORTUNITY OF VINDICATING THE PASTOR.**

This declaration so emphatically repeated by the chief mouthpiece of the council, and put forth by him apparently as an exposition of the council's views, compels me, as the third party to the controversy, to choose between two alternatives.

One of these is to remain contentedly in the dishonorable position of a man who denies to his former pastor an opportunity for the vindication of that pastor's character—an offence the more heinous because an unsullied character and reputation are requisite to his sacred office.

The other alternative is for me to restore to his church their lost opportunity for his vindication, by presenting myself voluntarily for the same trial to which the church would have power to summon me if I

were a member—a suggestion which (judging from my past experience) will subject me afresh to the unjust imputation of reviving a scandal for the suppression of which I have made more sacrifices than all other persons.

Between these two alternatives—which are all that the moderator leaves to me—and which are both repugnant to my feelings—duty requires me to choose the second.

I therefore give you notice that if the pastor or the examining committee, or the church as a body, desire to repossess the opportunity which the moderator laments that you have thrown away, I hereby restore to you this lost opportunity as freely as if you had never parted with it.

I authorize you (if such be your pleasure), to cite me at any time within the next thirty days to appear at the bar of Plymouth Church for trial on the charge heretofore made against me, namely, that of "circulating and promoting scandal derogatory to the Christian integrity of the pastor and injurious to the reputation of the church."

No citation was issued to Mr. Tilton to appear in accordance with this offer.

As a phase in the developments in this connection, which tended to aggravate and precipitate the action of the parties, we may mention, that in the several letters of the ex-moderator to the Independent, he took occasion to remark, that Mr. Beecher was the soul of magnanimity, and Mr. Tilton was inspired with a calumnious spirit, and upon his return to New Haven, he delivered an address before Yale College upon the council, and reiterated his belief in the source and spring of the slanders, and proceeded to say:

Another part of my theory is that Mr. Beecher's magnanimity is unspeakable. I never knew a man of a larger and more generous mind. One who was in relations to him the most intimate possible, said to me, "If I wanted to secure his highest love, I would go into a church meeting and accuse him of crimes." This is his spirit. But I think he may carry it too far. A man whose life is a treasure to the Church Universal, to his country, to his age, has no right to subject the faith in it to such a strain. *Some one has said that Plymouth Church's dealing with offenders is like Dogberry's. The comparison is apt: "If any one will not stand, let him go and gather the guard, and thank God you are rid of such a knave."* So of Launce, who went into the stocks and the pillory to save his dog from execution for stealing puddings and geese. I think he would have done better to let the dog die. And I think Mr. Beecher would have done better to have let vengeance come on the heads of his slanderers. \* \* \*

It may properly be questioned whether the speaker did not exercise a too hasty judgment in thus enunciating, when he had already realized that Plymouth Church "threw away its opportunity of vindicating the pastor;" and when he knew, or might have known, that there had been an offer on the part of the person accused to be examined on the question, and that his offer had not been accepted. The several essays of the ex-moderator, and his address at Yale College, were widely circulated, and must, in the nature of things, have injuriously tarnished the reputation of the person against whom they were launched. What did Mr. Tilton do under these imputations? He repaired to Mr. Beecher and insisted the matter be set right with Rev. Dr. Bacon, and before the community; that he was unwilling to be pointed at before the world in the light and character foreshadowed in the Bacon essays, and as the subject of his magnanimity. That after waiting a reasonable time and finding the current of public opinion setting direfully against him, and no vindication forthcoming, he published his letter in the *Golden Age*, vindicatory of his action, and illustrating on which side resided "magnanimity." He pictured the concatenation of circumstances which, at greater length, he has testified to on the trial.

It was considered at the time that that publication developed a sequel, at least, to the darkling cloud which a few years before had hovered over Plymouth Church. Mr. Beecher made no allusion to this impeachment, but it being summer, he kept the even tenor of his way, and proceeded to the mountains to enjoy his usual vacation. Summer weeks passed, and Mr. Beecher returned to minister again to his church. Amidst the excitement which then pervaded the community, Mr. Tilton was arrested upon a complaint filed in a justice's court, by one William J. Gaynor, then a reporter on the *Brooklyn Argus*—on the charge of libelling Mr. Beecher. The action was, on the following day, quashed on jurisdictional grounds. Soon after followed Mr. Beecher's invitation to certain gentlemen, asking them to act as a committee of investigation, and "to do that which truth and justice might require;" and when

they had satisfied themselves by an impartial and thorough examination of all sources of evidence, to communicate to the examining committee, or to the church, such action as might then seem to them right and wise.

The committee consisted of Henry W. Sage, Augustus Storrs, Henry M. Cleveland, Horace B. Claflin, John Winslow, and S. V. White. They convened at the house of Mr. Storrs, and sat with closed doors. Statements were presented by Mr. Beecher and Mrs. Tilton, Mr. Moulton and Mr. Tilton, and after a time a report was submitted and filed with the church, declaring, in effect, that Mr. Beecher was entitled to exculpation from all charges of a criminal character.

Shortly after the decision of the committee, Mr. Beecher went before the grand jury and obtained an indictment against Mr. Tilton for libel, on which he was arrested. Several weeks prior to that indictment, however, Mr. Tilton had actually commenced this action against Mr. Beecher.

This action of *criminal conversation*, wherein the damages are laid at one hundred thousand dollars, was reached on the calendar for trial and opened to the jury on the eleventh day of January last, in the City Court of Brooklyn. The case was preluded with the variety of coincidences we have mentioned, and more besides, some of which were already familiar to those who had kept pace with the mysterious complication.

Previous to this cause being reached for trial, a bill of particulars was demanded by the defendant's counsel, which was refused. A hearing upon that question was had at the General Term of the City Court, and a decision rendered adversely to the application. The statute of New York State provides, that, "the court may in all cases order a bill of particulars of the claim of either party to be furnished." And the current run of decisions of that state, hold it to be a matter quite within the discretion of the court.

An appeal from the order denying the application was taken to the Court of Appeals, and there argued at considerable length—William M. Evarts appearing as counsel for the defendant, and Roger A. Pryor for the plaintiff. The appellate court reversed the order of the city court, denying Mr.

of circumstances which characterize its history. The address occupied nearly three days in its rendition, and was delivered in an easy, felicitous style, sprinkled here and there with metaphor and homely eloquence, which at times quite enchained his auditory. As a forensic effort it was considered praiseworthy.

On the afternoon of the third day of the trial, Augustus Maverick was placed upon the stand, and proved the fact of marriage. The plaintiff was married on the 2d of October, 1855, at the defendant's house, and by the defendant.

Then followed the testimony of Francis D. Moulton,—the "mutual friend," the custodian of all letters and documents which passed between the litigating parties, since the memorable night of December 30, 1870, when, as is deposed, the disclosure was made by the plaintiff to the defendant, of the inculpatory letter of Mrs. Tilton, and when the crime was charged on account of which this action was brought. The plaintiff testified to a detailed statement, reciting what he told the defendant, as to the sexual relations of which his wife had informed him.

The following is a part of the testimony of the plaintiff, brought out on the direct examination, as to the times and places of adultery here charged and alleged :

That she then said to me that it was a secret between herself and the Rev. Henry Ward Beecher, her pastor, that, as I was well aware, there had been, during a long course of years, a friendship between herself and her pastor; that this friendship, contrary to my expectation or belief, had been in later years more than friendship, it had been love; that it had been more than love, it had been sexual intimacy; that this sexual intimacy had begun shortly after the death of her son Paul; that she had been in a tender frame of mind, consequent upon that bereavement; that she had received much consolation during that shadow on our house, from her pastor; that she had made a visit to his house while she was still suffering from that sorrow, and that there, on the 10th of October, 1868, she had surrendered her body to him in sexual embrace; that she had repeated such an act on the following Saturday evening at her own residence, 174 Livingston street; that she had, consequent upon those two occasions, repeated such acts at various times, at his residence and at hers, and at other places—such acts of sexual intercourse continuing from the fall of 1868 to the spring of 1870; that in July, 1870, she had

made to me a confession in detail of those acts; that she had given to me also, during that recital, many of the reasonings by her pastor communicated to her to change what were her original scruples against such a sexual intimacy.

The testimony shows that the interview of December 30 was held at Mr. Moulton's house; that afterward, the plaintiff consenting, the defendant called on Mrs. Tilton—who was then lying upon a bed of sickness—when she indited for him the following recantatory letter:

DECEMBER 30, 1870.

Wearied with importunity and weakened by sickness, I gave a letter inculcating my friend Henry Ward Beecher, under assurances that that would remove all difficulties between me and my husband. That letter I now revoke. I was persuaded to it—almost forced—when I was in a weakened state of mind. I regret it, and recall all its statements.

(Signed)

E. R. TILTON.

I desire to say explicitly, Mr. Beecher has never offered any improper solicitations. but has always treated me in a manner becoming a Christian and a gentleman.

(Signed)

ELIZABETH R. TILTON.

Taking that letter with him the defendant returned to Mr. Moulton's house, and was soon after accompanied to his own house by Mr. Moulton.

The evidence further shows, that Mrs. Tilton wrote a letter to her husband the same night as follows:

DECEMBER 30, 1870—Midnight.

MY DEAR HUSBAND: I desire to leave with you before going to sleep a statement that Mr. Henry Ward Beecher called upon me this evening, asked me if I would defend him against any accusation in a *council of ministers*, and I replied solemnly that I would in case the accuser was any other but my husband. He (H. W. B.) dictated a letter, which I copied as my own, to be used by him as against any other accuser except my husband. This letter was designed to vindicate Mr. Beecher against all other persons save only yourself. I was ready to give him this letter because he said with pain that my letter in your hands addressed to him, dated December 29, "had struck him dead and ended his usefulness."

You and I both are pledged to do our best to avoid publicity. God grant a speedy end to all further anxieties. Affectionately,

(Signed)

ELIZABETH.

On the following day she also wrote a note to Mr. Moulton,

which, in this connection may be pertinent, as we shall advert to it hereafter. She said :

SATURDAY MORNING.

MY DEAR FRIEND FRANK :

I want you to do me the greatest possible favor. My letter which you have and the one I gave Mr. Beecher, at his dictation, last evening, ought both to be destroyed. Please bring both to me, and I will burn them. Show this note to Theodore and Mr. Beecher ; they will see the propriety of this request. Yours truly,

E. R. TILTON.

The witness further deposes, that consultations were held from time to time, between the defendant and himself, and that on several occasions the crime alleged in this action was confessed by the defendant. But that, notwithstanding that fact, he consented to stand in the breach, to act the mediator—to retain in his custody all matters and things which had passed or should pass, between the parties, to dissuade members of the church from any lurking belief in the truth of the story—to silence suspicious tongues ; and, in short, to be the safety-shield against disclosure, and bear the defendant, as Æneas bore his sire, upon his shoulders through the fire.

Such were the therapeutics, as deposed, to conserve the reputation of all parties in the unhappy affair.

Relative to the action taken upon the appearance of the Woodhull publication in November, 1872, Mr. Moulton testifies :

Q. (By Mr. Fullerton.)—State what occurred between you? A. Mr. Beecher said that he had come to consult with me as to what it was best to do with reference to that publication ; what reply could be made to it, if any reply could be made. \* \* \* I said to Mr. Beecher, " If I say anything about it I think this will be the best thing for me to say uniformly ; that if the story is true, it was infamous to tell ; and if it was false, it was diabolical to have told it ; and that if his life was not an answer to it, I could not choose to make any—I should not choose to make any to anybody." Mr. Beecher said to me that he thought it would be judicious for me to make such a reply as that ; and I met him after this conversation, and I told him that I had made such a reply as that to several parties, and it appeared to satisfy them.

That at some of the interviews held when this subject was talked of, Mr. Tilton was present.



That on the 31st day of December, 1870, he received an invitation from Mr. Beecher to call at his house the next day. That accordingly he did so, *i. e.*, January 1, 1871,—and an extended consultation was had over the troubles, which resulted in the following epistle being written :

BROOKLYN, January 1, 1871.

In trust with F. D. Moulton.

MY DEAR FRIEND MOULTON:

I ask through you Theodore Tilton's forgiveness, and I humble myself before him as I do before my God. He would have been a better man in my circumstances than I have been. I can ask nothing except that he will remember all the other hearts that would ache. I will not plead for myself; I even wish that I were dead. But others must live and suffer. I will die before any one but myself shall be inculpated. All my thoughts are running towards my friends, toward the poor child lying there and praying with her folded hands. She is guiltless, sinned against, bearing the transgressions of another. Her forgiveness I have. I humbly pray to God that he may put it in the heart of her husband to forgive me. I have trusted this to Moulton in confidence.

H. W. BEECHER.

Mr. Moulton further testified, that he wrote down the words at the request of Mr. Beecher, and read the letter over to him after it was written; and also, that Mr. Beecher read it himself, and added the words in the last line—"I have trusted this to Moulton in confidence"—writing them himself, and then signed the paper.

Doubtless, to a considerable degree, on these acts portrayed in the testimony of the "mutual friend," and the documentary evidence in the case, hinges the plaintiff's right of action. We shall take occasion as we proceed, to advert to the testimony of the defendant in denial, and explanatory of this evidence.

Let us now turn for a moment to consider one of the examiners,—the sifter-out of the plaintiff's case—William Fullerton, upon whom has principally devolved the task of conducting the direct and cross-examination on behalf of the plaintiff.

This gentleman had, before entering the arena of this trial, achieved a good reputation for astuteness and sagacity, in the department of examining witnesses. He has an analytical

mind, and aims to probe a proposition of evidence to the center. Having a goodly supply of wit and sarcasm, he yet bears himself with calmness and generous dignity. The scope of the action necessarily involved the investigation of a vast amount of conflicting matter, and careful study of method and arrangement of procedure. At the New York bar, he has been engaged in many important cases, particularly in the United States court. He is about the average height; has a fair, florid complexion and much suavity of manner. For upwards of twenty-five years he has practiced in New York. In the several cross-firings and passages-at-arms, which have characterized this trial, his sallies of wit and sharp sayings have quite matched, if not put to rout those of his opponent.

Directly pitted against him in this forensic combat, has been Mr. Evarts, who has taken a relative position for the defendant that Mr. Fullerton has for the plaintiff. William M. Evarts is more widely known. He has filled several important positions at the hand of the general government. In 1871 he was selected by the President as senior counsel to present the claims of the United States before the Geneva arbitration, and upon his masterful efforts a favorable result was wrought out—an indemnity reward of some fifteen millions. At that court he towered above many of the English representatives, however much they prided themselves upon their superiority of blood and culture. Mr. Evarts was appointed to the attorney-generalship of the United States under President Johnson, which high office he held for a season, where he found a suitable field to display his legal acumen, and his discharge of the duties of that office will compare favorably with the bright array of men who have graced the station. His intuitive knowledge of men, engendered by extensive travel, and his prescience of genius, go far toward making him learned in the law, as generally understood, as well as a speaker and orator of scholastic elegance. His efforts in the impeachment trial of Andrew Johnson for *mala fides* in office, won for him considerable reputation. He possesses a calm, thoughtful and earnest manner in speaking, a quiet, persuasive eloquence. Mr. Evarts is not far from sixty years of age, of delicate phys-

ique, thin features, a pleasant blue eye, with a dignity of bearing altogether attractive and engaging.

Considering the broad field, and the multifariousness of his labors, he can not but possess a very elastic mind, and a force of will capable of surmounting almost any obstacle. Not the least unworthy of notice here, is the fact that he has done much toward purifying the legal profession, and as one of the prime movers, and for years the esteemed president of the Bar Association of New York, he has won a well-deserved distinction.

At the hands of Mr. Evarts, the principal witness for the plaintiff, Mr. Moulton, was subjected to the severest scrutiny and cross-examination. Taken together, the testimony of this witness developed a very remarkable state of facts.

While leaning upon Mr. Moulton, the defendant wrote the following pathetic sentence in a letter dated February 5, 1872:

Sacrifice me without hesitation if you can clearly see your way to his safety and happiness thereby. I do not think that anything would be gained by it. I should be destroyed but he would not be saved. E. and the children would have their future clouded. In one point of view I could desire the sacrifice on my part. Nothing can possibly be so bad as the horror of great darkness in which I spend much of my time. I look upon death as sweeter-faced than any friend I have in the world. Life would be pleasant if I could see that rebuilt which is shattered. But to live on the sharp and ragged edge of anxiety, remorse, fear, despair, and yet to put on all the appearance of serenity and happiness, can not be endured much longer. I am well nigh discouraged. If you, too, cease to trust me—to love me, I am alone; I have not another person in the world to whom I could go.

A number of other witnesses were examined on collateral points, as is always incumbent upon the plaintiff in presenting proofs in a case of a criminal or semi-criminal character, resting, as this case has rested, upon circumstantial evidence—the best evidence, however, that can be adduced in most actions of this kind. The act, as generally alleged in cases of this character, implies at least three things, as has been said by some commentator. First, the opportunity; secondly, the disposition in the mind of the adulterer; thirdly, the same in the *particeps criminis*; and “the proposition is substantially true,

that, wherever these three are found to concur, the criminal fact is committed." A distinguished statesman and orator \* has advanced the proposition that when circumstantial proof is in its greatest perfection, that is, when it is most abundant in circumstances, it is much superior to positive proof.

It is a fundamental rule of evidence, that the circumstances alleged as the basis of any legal inference must be strictly and indubitably connected with the *factum probandum*; and that the *onus* is upon the party who asserts the existence of any fact which infers legal accountability.† There are at least two time-honored maxims in criminal cases, which may have some applicability here. (1.) That circumstantial evidence falls short of positive proof; (2) that it is better that ten guilty persons should escape than one innocent person should suffer. But in cases of *positive* proof, however, the testimony of the senses can not be implicitly relied upon, even where the veracity of the witness is unquestionable.‡ And thus, in the more recent adjudications, the first rule would hardly be considered sound; for presumptions necessarily follow in the line of concurrent and proved facts, and when one is proved to have occurred, the others naturally accompany them.

On the fourteenth day of the trial, the plaintiff was called to the witness stand, when Mr. Evarts interposed an objection and at once proceeded to argue the question of his inadmissibility as a witness in his own behalf. No law point raised during the trial involved a more vital issue. The motion for a bill of particulars was important. But this objection struck at the heart of the plaintiff's case, and, if succeeded in, would have made an hiatus in the case altogether damaging.

Mr. Evarts had evidently prepared himself; for in the course of his argument he cited numerous English and American authorities to illustrate how thoroughly and completely the common law, from questions of policy, interest and good morals, had excluded the testimony of a party standing in the relation of the plaintiff in this case. He cited Gilbert on Evi-

\* *Vide*, Burke's Works, vol. II., p. 624.

† 1 Greenl. Ev. ch. 3; Starkie on Ev. vol. I., p. 162.

‡ *Vide*, Rex v. Wood, 28 State Trials, p. 819.

dence, where it is held that the rule of exclusion of husband and wife is grounded on the identity of interest and public policy. Greenleaf declares that communications between husband and wife belong to privileged communications.\*

The rule arose from that anxious solicitude which the law discovers to preserve domestic tranquility.† Some of the cases cited and dwelt upon in the course of his argument, were *Stein v. Bowman*,‡ where Mr. Justice McLean delivered an elaborate opinion upon the admissibility of the testimony of a wife against her husband. The court said: "The decisions which have been made upon these points seem to have been influenced by the circumstances of each case, and they are somewhat contradictory. It is, however, admitted in all cases of violence upon her person, directly to criminate her husband or to disclose that which she has learned from him in their confidential intercourse." He cited *Southwick v. Southwick*,§ which is a case involving quite analogous principles, and was fully discussed, as tending to show the bearing of the common law upon it. The counsel also referred to the cases, *Hasbrouck v. Vandervoort*,|| *The People v. Mercein*,¶ *Dennison v. Page*,\*\* and several English authorities; and also commented at considerable length upon the case of *Dann v. Kingdom*,†† and the law of 1867, which he argued was only intended to moderate and qualify, on matters of interest, the exclusion of husband and wife in testifying for or against each other, or on behalf of any party in certain cases.

By the Session Laws of New York, chap. 887, page 2221 (1867), it is provided that in any trial in any suit, the husband or wife of any party thereto opposed or defended, shall, except as stated in sections 1 and 2 of the act, be competent and compellable to give evidence the same as any other witness on behalf of any party to such suit, action or proceeding.

\* *Vide*, 2 Kent's Com. 178; Phillips on Ev.; Reeves on Domestic Relations.

† 2 Rolle Abr. 686.

‡ 13 Peters, 209.

§ 49 N. Y. 510.

|| 9 N. Y. 153.

¶ 8 Paige, 50.

\*\* 29 Pa. St. 420.

†† 1 N. Y. Sup. Ct. 492.

Section 2 provides as follows:

Nothing herein contained shall render any husband or wife competent or compellable to give evidence for or against the other, in any criminal action or proceeding (except to prove the fact of marriage in case of bigamy), or in any action or proceeding instituted in consequence of adultery, or in any action or proceeding for divorce on account of adultery (except to prove the fact of marriage), or in any action or proceeding for, or on account of criminal conversation.

Section 3:

No husband or wife shall be compellable to disclose any confidential communication made by one to the other during their marriage.

Adverting to the common-law rule in such cases, and to the modification under the laws of 1867, we may say, that the case of *Dann v. Kingdom* was a decision of the General term of the Supreme Court of New York in 1873, a criminal conversation case, where the principal question involved was the attempt to prove the fact of marriage. The plaintiff was excluded from it. The court, E. D. Smith, J., indicated that it could find no change in the common law as applicable to that case, produced by the law of 1867.

In closing his argument Mr. Evarts said: "And yet it is supposed that the common-law that shuts the mouth of the witness who knows the truth, and whom the law presumes innocent until she is proved guilty, says she can not defend herself because she is the wife of this husband, and he can destroy her because he is the husband of this wife."

One of the senior counsel of the plaintiff—Roger A. Pryor—answered the argument of Mr. Evarts. General Pryor, as he is commonly called, on account of his having served in that capacity in the Confederate army, was, at the outbreak of the war, a representative in Congress from Richmond. He has been a member of the New York bar upwards of ten years. Took a positive, decided stand when the Confederacy collapsed, and wrote a strong, manly letter to his former constituents, conjuring them to adhere to the cause of the Union, and wisely accept the situation. His success has been quite noted in New York, his clientage leading him into the higher walks of the profession.

The argument opposing the motion for a bill of particulars, which he delivered before the court of appeals, was fruitful of logic and analytical research.

Although he is upwards of fifty years of age, he has such a delicate figure and features, wearing no appendage of hair on his face, that he might pass for one very much younger. He is tall—about six feet; has a heavy head of dark brown hair, slightly sprinkled with gray; a semi-defiant expression of the mouth, making him look as though he were about to ejaculate words of bitterness.

His argument in favor of Mr. Tilton's admissibility as a witness was quite thorough and exhaustive. He dwelt more at length upon American authorities than his opponent, and adverted to the changes in the law which had been wrought under the act of 1867. To some extent the issue pivoted upon the point as to how far (in that state), that law innovated upon the common law. Some of the latest cases cited by the counsel, were *Petrie v. Howe*,\* *Carpenter v. White*,† and *Maverick v. Eighth Av. R. R. Co.*,‡ and certain cases which were touched upon by Mr. Evarts, in his argument. Mr. Pryor has an earnest, fluent style, and that rapidity of manner which is somewhat characteristic of Southern speakers.

Calling the court's attention to the several acts which had wrought changes in the law, on the competency of husband and wife or a party in interest as a witness, he referred to Lord Denman's act of 1843, which abrogated the disability of a witness arising from interest and infancy; Lord Brougham's act of 1850, which removed the barriers growing out of the relation of parties; and Lord Campbell's act of 1853, which abolished the incompetency of coverture. He also considered the decisions of the state of New York, and its modifying statutes. He referred to Mr. Roscoe's work on Criminal Evidence, at page 123, where the author, adverting to the case of *Rex v. Cliviger*, announces the rule where husband and wife are excluded from testifying at common law, and says:

\* 4 N. Y. Sup. Ct. 85.    † 46 Barb. 292.    ‡ 36 N. Y. 378.

But the rule only extends to cases where the husband or wife are actually on their trial, that they may give evidence tending to criminate the one or the other, except where the person against whom the evidence points is actually on his trial. It was once thought otherwise, but the mistake (clearly a mistake), seems to have arisen from not having drawn the distinction clear enough between competency and privilege.

And so in a recent case in New York,\* Mr. Justice Barrett propounds the principle in these words :

The evidence of husband and wife is undoubtedly receivable in a collateral proceeding for the purpose of proving any fact material to the issue, and that although the fact so testified to by the one may tend to criminate or contradict the other.

That case enunciates in effect the law of New York. Running along the same line, and by stages to the same end, sprung up the legislation on the subject in that state. Thus, by constitutional ordinance in 1846, incapacity to be a witness on account of defect of religious principle was abolished. The incompetency arising from interest was abolished in 1848; incapacity of the party to an action was removed in 1857; and then as the outgrowth of more liberal principles, came the law of 1867. And still more recently the humane rule of law allowing a party arraigned for a criminal offence to testify in his own behalf, which law also obtains in Massachusetts and Maine.

The several innovations thus referred to, doing affront to the natural prejudices of the profession, required judicial discussion and construction. The common law left adultery to the cognizance solely of the ecclesiastical courts, who chastised it *pro salute animæ*, as they expressed it. In New York adultery was never, nor is it to-day, a crime, but is regarded as a private wrong, exposing the *tort feasor* to an action for civil damages—never considered a penal offence.

Besides the cases already touched upon as bearing upon the matter in question, may be found, *Hooper v. Hooper*,† *Hall v. Hall*,‡ *Card v. Card*,§ *Carpenter v. White*,|| *Babbott v. Thomas*,¶ *Matteson v. N. Y. C. R. R. Co.*, (1862),\*\* affirmed

\* Reported in *Abbott's Practice Reports*, New Series, Vol. V. page 55, title of case, *The Royal Insurance Co. v. Noble*.

† 43 Barb. 292.

‡ 30 How. Pr. 59.

§ 39 N. Y. 317.

|| 46 Barb. 292.

¶ 31 Barb. 277.

\*\* 62 Barb. 364.



in the court of appeals,\* holding that the husband and wife are competent witnesses for and against each other in all cases where they are parties separate to the action. In *Bunnell v. Greathnead*,† being an action of criminal conversation, the plaintiff was admitted as a witness and alone testified to the fact of the adultery. The case of *Petrie v. Howe*, decided in 1874,‡ seems to be quite analogous to the question. There the plaintiff was admitted as a witness, and no question raised on the appeal that he had been improperly admitted, by virtue of the law of 1867.

In this last case, which was a case of *crim. con.* quite a novel question was asked the plaintiff, *i. e.*, as to the color of the hair of his children, whereupon the defendant's counsel excepted on the ground of the impossibility of that proving any fact material to the issue and as incompetent. The court allowed the question, and an exception was taken. The general term held the exception well taken, and in its opinion says, that if the hair of the child in question "was of a color resembling that of the defendant, it is quite apparent that an impression was likely to be made upon the minds of the jury quite injurious, and possibly unjust to the defendant upon the main issue."

Another counsel of the plaintiff, William A. Beach, who also argued upon the plaintiff's admissibility as a witness, cited several authorities in the direction pointed out by Mr. Pryor.

Mr. Beach is a very engaging speaker, and is expected to sum up the case to the jury for the plaintiff;§ he possesses an electrical power as an orator, has a clear resonant voice, a lively enunciation, combined with logical reasoning. He has a fund of humor and pathos. This counsel has figured in very many cases of importance. In the *Cole-Hiscock* trial in 1869, he was senior counsel for the defence. He has acted as counsel in several of the *Erie* litigations. In the second trial of *Stokes* he acted for the people; and in the *Brinkley* divorce suit displayed much ability. He defended Judge Bar-

\* 35 N. Y. 487      † 49 Barb. 106.      ‡ 4 N. Y. Sup. Ct. 85.

§ This article was written before the arguments of counsel had been made.—ED.

nard in his impeachment trial, several years ago, and his touching eloquence in addressing the jury in that case, melted many of his auditory to tears.

Mr. Chief Justice Neilson, in rendering his decision upon the question of admitting the plaintiff to testify, held :

" 1. That the plaintiff was competent to be sworn and to testify in his own behalf.

" 2. That touching the principal question in issue, he was not competent to testify to any confidential communications.

" It is considered that this qualified direction respects the present state of our law of evidence, as the same has received legislative and judicial expression, and also respects what may remain of the rule which imposes silence or restraint by reason of the marital relation, and on grounds of public interest or policy."

The counsel arrayed on the side of the plaintiff we have briefly mentioned. Those engaged for the defence, besides the gentlemen already noticed, are, Ex-Judge John K. Porter, John L. Hill, Austin Abbott and Thomas G. Shearman. Judge Porter is commonly spoken of as second in order of counsel for the defence. He is to sum up the case for the defendant, and a rare treat of forensic eloquence is expected to be displayed by him on the occasion. He is a graduate of Union College. He defended Horace Greeley in the notorious case of Dewitt C. Littlejohn against him, in 1862; was counsel in the Trinity Church Corporation case, as also in the Parish Will litigation. In 1863 he was appointed to a judgeship of the Court of Appeals, and was afterward elected a judge of that court for eight years, which position he filled with honor and satisfaction, and his course was generally praiseworthy. As one of the examiners into the accounts of Comptroller Connolly of New York, he did valuable service.

Ex-judge Porter is of medium height, has glossy black hair and mustache *a la militaire*; smooth skin, and a ruddy glow of countenance. Although not far from sixty years of age, he has a fresh, and at times a youthful look.

John L. Hill, the son of the once renowned counsel, Nicholas Hill, is also a graduate of Union College (class of 1862).

He has taken considerable part in the course of the trial in the examination of witnesses, in an aggressive, robust manner, and in working up the facts of the case, and directing their order of presentment. He is about forty years of age; has round but strongly marked features; a mustache, and light brown hair, which is very thin. Altogether Mr. Hill is a lawyer of force and ability.

Thomas G. Shearman, has compiled several law books—a work on Practice under the Code of New York, in connection with Mr. Tillinghast; a book on "Negligence," conjointly with Mr. Redfield,—besides having achieved some notoriety for astuteness in connection with certain Erie railway litigations. He has been particularly active in behalf of the defendant in this case, in preparing it for trial, in sifting out evidence, and in attending to the running office work. He is below the medium height, has a large head and features, and black hair and beard.

Austin Abbott is too well known as the extensive law-book compiler to need any extended mention. During the progress of the trial he has prepared the briefs and collated the law points, which have been used by the defendant's counsel, in the various arguments made from time to time. His familiarity with cases, and his facility of reference to citations bearing upon certain points of law, make him peculiarly valuable and available in this case.

The next legal question of any considerable importance, was that involving the rule of evidence as to the admissibility of parol testimony, to show the contents of the confession-letter, alleged to have been written by Mrs. Tilton to her husband, which was said to have been exhibited to the defendant by the plaintiff on the evening of December 30, 1870, which letter had been destroyed, with the concurrence of all parties concerned.

Mr. Fullerton argued, that the paper writing was not destroyed at a time when any litigation was contemplated, nor for the purpose of depriving anybody of any benefit that might arise out of its particular phases, but was destroyed because it was not thought advisable to keep such a paper in

existence. The testimony shows, that it was kept until after the spring of 1872, when the "tripartite agreement" was executed, and then it was delivered to Mrs. Tilton; and the plaintiff says his wife, in his presence, destroyed it. Counsel said :

Your honor will perceive that there was a reason at that time for the destruction of this paper, which it was very proper to execute and carry into effect. That the only reason we ever heard why we can not give parol evidence of a written paper that has been destroyed, is because it has been destroyed in fraud, for the purpose of obliterating the contents of the paper so that an advantage might be obtained in giving parol evidence of it.

Mr. Beach also argued the question, and cited Judge Redfield's edition of Greenleaf, section 200; *Renner v. Bank of Columbia*,\* *Blade v. Noland*,† and *Broadwell v. Stiles*.‡

In *Blade v. Noland* it was held, that evidence of the contents of a note (sworn by plaintiff to be lost or destroyed), or to resort to proof of the original consideration of the note in support of his action, without accounting for the loss or destruction of the note, in such manner as to repel all inference of a fraudulent design in its destruction, could not be introduced. The court, Nelson J. says, after reviewing the rule laid down in the cases 2 Johns. Cas. 388, 2 Caines, 363, 10 Johns. 374, 363; 11 Id. 446, and others, that the rule "has been much relaxed and extended in modern times, from necessity, and to prevent a failure of justice; yet I believe no case is to be found where, if a party has deliberately destroyed the higher evidence, without explanation showing affirmatively that the act was done with pure motives, and repelling every suspicion of a fraudulent design, that he has had the benefit of it."

So in *Renner v. The Bank of Columbia*, it was held, that secondary evidence of the contents of written instruments is admissible where it appears that the original is destroyed, or lost, by accident, without any fault of the party. That every case must depend, in a great measure, upon its own circumstances.

\* 9 Wheat. 581.

† 12 Wend. 173.

‡ 3 Halst. N. J. 58.

Mr. Justice Thompson, delivering the opinion, says: "If the circumstances will justify a well grounded belief, that the original paper is kept back by design, no secondary evidence ought to be admitted."

Mr. Evarts followed in an argument, citing in answer, the case of *Count Joannes v. Bennett*,\* *Riggs v. Taylor*.† The point in the last case being, where a paper had been destroyed under an erroneous impression.

The court, Todd, J., says: "It will be admitted, that when a writing has been voluntarily destroyed, with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its non-production, in such cases the secondary proof ought not to be received; but in cases where the destruction or loss, although voluntary, happens through mistake or accident, the party can not be charged with default."

The court allowed the plaintiff to state what he said to the defendant as to the confession of Mrs. Tilton.

Upon the opening of the court on the following morning, an amusing incident occurred. Mr. Evarts, in his argument, had cited the case of the *Count Joannes v. Bennett*.‡ This mention induced the Count's appearance before the court, and he declared that the facts there reported were incorrect and injurious to him, and he desired to explain. The presiding justice, in his blindest of manner, naively remarked that the citation made was from an authority, and was made correctly as stated in that authority, and he was happy there was no ground to complain further. "Not the slightest" responded the Count, "only that Allen, the reporter, was my enemy and he did not report what was right. I say, with Shakspeare, then, 'I'll have no more reports;' I am much obliged to your honor." (Laughter).

As the case proceeded it was attempted to be shown what Mr. Tilton read to the defendant, as the contents of the confession of the letter of Mrs. Tilton to her husband, when another word-sparring tournament on legal quibbles ensued. After an extended argument on the question by plaintiff's counsel, the

\* 5 Allen (Mass.) 169      † 9 Wheat. 483.      ‡ 5 Allen, 169.

court ruled out the contents of the paper, holding that it was not proper for the court to receive anything that she had written under any circumstances, unless it came in without objection. On the admissibility of certain other letters, conversations and statements, many nice and interesting questions of evidence were discussed.

The plaintiff, in his testimony, stated that on the evening of the 30th of December, 1870, he directly charged the defendant with the act of crime set forth in his complaint. By the following testimony of the defendant, it will be seen that he denies the fact positively and directly. He says :

Q. (By Mr. Evarts.) During that whole interview between Mr. Tilton and yourself, Mr. Beecher, which you have given your narrative of, and he his, did Mr. Tilton, in any form, accuse you of the crime of adultery with his wife ? A. Most certainly he did not.

Q. Did he, by way of recital, or otherwise, say to you or intimate to you that his wife had ever accused you to him of adultery ? A. He did not.

Q. Was there, at any time, during that conversation, raised between you, on his part, or on your part, the question whether you had committed adultery with his wife ? A. There was no such question, no such allusion, no such topic, by intimation or by express language, or in any manner whatsoever.

Q. Was there any statement by him of either verbal or written accusation of or imputation against you by his wife, except the memorandum read about improper solicitations ? A. Nothing but that.

Q. Was there during that conversation any reference to, recital, or suggestion of the arguments by which you had overcome her virtue and triumphed over her chastity ? A. No, sir ; no, sir ; nothing.

The cross-examination of the defendant, as to whether or not he dictated the letter which he received from Mrs. Tilton on the evening of the 30th of December, 1870, did not shake his direct testimony in any particular. He denied that he was made aware of the contents of the letter before the supplementary part of it was written, and denied absolutely that he dictated it. That he only made the general suggestion that she ought to give him something that should be an effectual retraction.

Then followed the cross-examination, *seriatim*, as to the letter which Mrs. Tilton wrote to her husband, dated " Decem-

ber 30, 1870—midnight," and the defendant denied generally that he used the words and phrases which it is therein stated he did. Adhering to the same line of cross-examination, the defendant was interrogated as to the "contrition letter," so-called, dated January 1, 1871.

This piece of evidence being one of the most potent in way of documentary proof, and having given the gist of Mr. Moulton's testimony as to what transpired when it was written, it would seem to be fitting that we present the questions and answers verbatim, as brought out on the cross-examination of the defendant. We, therefore, cull from the evidence such parts as present the denials of the defendant.

Q. (By Mr. Fullerton.) I ask your attention now to the part, first clause in that memorandum, which reads thus, I suppose; I read from a print:

I ask through you Theodore Tilton's forgiveness, and I humble myself before him as I do before my God —

Did you express that sentence in those words or their equivalent to Mr. Moulton that night? A. I did not. I did say that in view of the statements made I felt that I had wronged him, and I had wronged his household, and that I would—I had humbled myself before God for it; and I was willing to humble myself before Mr. Tilton.

Q. This clause:

He would have been a better man in my circumstances than I have been—

Did you express that clause in those words, or any equivalent meaning or expression? A. I did, substantially that, a good many times over.

Q. In what connection and in reference to what topic concerning which you were speaking? A. In reference to the fact that I had, as it were, almost on the first blush, sided against Mr. Tilton and with Mr. Bowen.

\* \* \* \* \*

Q. Did you express in these words this—that is—what appears as this clause in the memorandum:

I can ask nothing except that he will remember all the other hearts that would ache—

A. No, sir; I did not make any statement which is expressed by that formula—I did, in that conversation, repel the idea that I was acting selfishly.

\* \* \* \* \*

Q. Did you express in these words, or in any equivalents, this—

I will not plead for myself; I even wish that I were dead. But others must live and suffer.

A. Oh, that is not my phraseology, and it is a very pale and poor and feeble interpretation of the intensity with which I expressed my sorrow to lie in the sorrow of other people.

\*                      \*                      \*                      \*                      \*

Q. Did you dictate this clause :

I will die before any one but myself shall be inculpated. In those words or in any equivalent expression? A. Well, no, no such phrase as that. I have looked through this and I do not think I see a phrase in it that is mine, and yet I think I see the sources from which a good many of them were drawn. I did say that in certain—I cannot recall it definitely and certainly, but that I did express myself very strongly, that I had rather die than to have brought such trouble, or than to increase such trouble; that so far as myself alone was concerned I counted life very small if I could make reparation, but it was not as anything practical and definite; it was the strong expression of surging feeling of regret and remorse at the mischief that seemed to have been committed by me.

Q. I ask your attention to the next sentence :

All my thoughts are running toward my friends, toward the poor child lying there and praying with her folded hands.

The witness—Yes.

Did you express what is there—there appears as a clause? A. Very likely in substance, only this is a very poor expression, very meagre.

Q. What did you say, and in what connection, on that subject? A. I don't know exactly what I said. I know that I felt like a father that was standing over the dead body of a child. I remembered her; she was like death when I saw her, and she had been a dear child and friend to me, and I seemed to have destroyed her, her reason, or her moral sense, and perhaps her life, for she was hovering on the edge of life and death; and I spoke as one would speak of the intensity of my distress.

\*                      \*                      \*                      \*                      \*

Q. Did you use these words, or their equivalent, as contained in the next clause :

She is guiltless, sinned against, bearing the transgression of another?

A. Very likely, very likely; but I had lived in their household a life of intimate friendship for many years, and if I had alienated her affections in such a degree and manner as that it brought discord and such distress as even had paralyzed her moral sense, or rather her reason—if I had been the occasion of that, that mischief I took to myself. How could any man stand there and see this trouble—

Mr. Beach—This is a matter of reasoning. One moment, Mr. Beecher.

The Witness—Well, I won't reason.

Mr. Beach—No; one moment, sir.

Mr. Evarts—The blame of that you took to yourself? A. I took the blame to myself, and I continued to take it to myself until the year 1874.



Q. And the following clause, Mr. Beecher—are these your words or the expression of what you stated, in substance:

Her forgiveness I have; I humbly pray to God that He may put it into the heart of her husband to forgive me?

A. No, sir; that sentence must go with all the rest—it is not of my parentage; the question came up of Mr. Tilton's feeling—the severity of his feeling; the drift of the interview was such a statement on my part, or such an exhibition of my mood and purposes, as should lay the foundation for a kind interference between us and a reconciliation, and Mr. Tilton's feelings, the strength of them, was justified; and when I had shown what my real feeling was, it led to conversation in respect to the feeling all around.

Another interesting point of evidence was as to the introduction of testimony of the plaintiff as to his statement, made under oath, in writing, before the investigating committee, *i. e.*, the substance of the confession made by Mrs. Tilton to him in July, 1870, and also that of the defendant to the plaintiff in December and January following, and to Mr. Moulton.

Plaintiff's counsel asked: "What was that confession?" which question was objected to by Mr. Evarts, and an extended argument ensued. Mr. Evarts presented a cogent plea in endeavoring to exclude the question, contending that a reproduction of the confession as then stated, or not stated, had no appositeness to or bearing upon the enquiry, and he referred to the case of *Downs v. The N. Y. C. R. R. Co.*,\* which case, in effect, holds that the declaration must be simultaneous and connected. The answer in that case was excluded, the only pretence of introducing it being that it had been introduced on the other side. The court in that case said:

The question was objected to as leading, and that it was incompetent to prove the plaintiff's declarations. The evidence was not inconsistent with the declarations proved by the defendant, but it tended to corroborate testimony of the plaintiff by the fact that his statements had been consistent. This was not allowable. The conversation was not proved to have been a part of the same given in evidence by the defendant.

Had it been so, the evidence would have been competent. The plaintiff could have proved the whole of a conversation, a part of which the

\* 47 N. Y. 83.

defendant had given in evidence, if it was connected, and all related to the same subject.

Mr. Evarts then referred to the case of *Rouse v. Whited*, where—

The plaintiff showed that his property had been applied to the defendant's use in payment of a note made by the defendant and endorsed by the plaintiff, and proved that the defendant pointed out the property to the sheriff and declared that it was the plaintiff's. *Held*, that the defendant was entitled to prove his statement in the same conversation, that the note was the plaintiff's debt and he was to pay it.

And he closed his argument as follows :

And it is put expressly upon the ground that the law rests upon the rule that when the plaintiff avails himself of a statement or admission of the defendant to charge him, the defendant may avail himself of any other statement made by him, at the same time, tending to destroy or modify the use which the plaintiff might otherwise make of the admission or statement first called out by him, but it is only whatever is such qualification and modification arising as a part of that statement. Now, whenever a libel in a divorce suit, a bill in equity can be put in as evidence *per se* in favor of the party who signs and makes it, to qualify a statement that he has specifically made on an examination ; whenever an authority to that extent can be produced, then, perhaps, the present proposition of my learned friend, which is to introduce the bill of accusation in qualification of a specific answer, may find some strength.

Chief Justice Neilson disallowed the witness (the plaintiff), to read the statement, holding in effect, that it was a paper previously prepared. It was not a part of the conversation in respect to which they enquired, but an independent, deliberate act of the witness, a presentation upon which enquiry and examination was to be made, and afterwards, as had been proved, was made.

The substance of the testimony of the plaintiff as to what he said to the defendant on the evening of December 30, 1870, we have already touched upon.

The literature of the trial—the essays, poems, editorials, extracts of articles and novels, besides scores of letters—would make a volume of no mean reading.

As to the pertinency of many of the letters, and extracts of writings of the plaintiff and defendant, which form part of the case, we imagine it would require the logician depicted

by Samuel Butler, or the "subtlety of a Philadelphia lawyer," to analyze and divine their relevancy.

The hundred letters introduced, of the plaintiff and Mrs. Tilton, covering the space of ten years, evince that a lofty and Christian affection existed between them.

From Indiana, February 9, 1868, he writes her :

MY DEAR ANGEL :

\* \* \* How my soul blesses you day by day ! I can never describe how precious your love of your husband has appeared to him during these few weeks past. Your singleness, your fervor, your purity, your devotion. They fill my mind and heart with reverence, adoration and humility. \* \* \*

On the 28th of January, 1868, she writes :

MY BELOVED :

Don't you know the peculiar phase of Christ's character as a *lover* is so precious to me because of my consecration and devotion to you ? I learn to love you from my love to Him. I have learned to love Him from loving you ! I couple you with Him, nor do I consider it one whit irreverent as a man, bowed with grief for my sins. \* \* \*

And so, pervading and running through a score of letters, is breathed forth a rhythmical cadence of sweet words of love and affection, which seem to lead one irresistably to the conclusion that a purified and spiritualized conjugal relation existed between them.

From whatever cause they have become estranged, it is sad, indeed, to contemplate the calamity, the wreck of minds and hearts that has been wrought and the grief that must forever abide.

For him no more the blazing hearth shall burn,  
Or tender consort wait with anxious care ;  
No children run to lisp their sire's return,  
Or climb his knee, the envied kiss to share.

When nearing the close of the case there was another point raised involving the law of evidence, which is of interest to the profession. The plaintiff's counsel placed upon the stand a Mr. Robinson, an uncle of Mrs. Moulton, by whom it was proposed to be shown that in the month of June, 1873, she related to him the conversation she had with the defendant on the second day of that month, and as testified to by herself

on the trial. This application was strenuously opposed by the defence and argued.

The basis of this application seems to have been founded in the expressions used by the defence in their opening, and in an opinion expressed by the defendant in his testimony. The defendant's counsel in his opening made statements which implied that Mrs. Moulton's testimony as to that interview was given under bias or compulsion of her husband; and the defendant testified in so many words, that he believed that "Mrs. Moulton had been made to make that statement by influence."

The plaintiff's counsel rested their argument of this application upon the proposition, that when the testimony of a witness is impugned by the imputation that it is a recent fabrication, or the product of some special interest or influence, then it is competent to prove, in the one case, that the witness told the same story prior to the date of the supposed fabrication, and in the other that he made the statement before the existence of the imputed interest or influence.

The defence argued upon the general proposition and principle that hearsay evidence is inadmissible, and that confirmatory extra-judicial statements could not be received under the circumstances in this case, and also contended that no witness had been introduced to show that Mrs. Moulton had made contradictory statements out of court, and that such situation must exist before the plaintiff could introduce that kind of evidence.

There are a number of cases in the books upon this branch of evidence, some holding in favor and some against the principle contended for, but all, however, resting upon a distinct state of facts and circumstances appertaining to each particular case.

In *Butler v. Truslow*,\* the exception contended for by the defendant seems to be adhered to. In *Smith v. Stickney*,† *Wells, J.*, holds, in effect, that when the witness is impeached by proof that he has made statements on other occasions inconsistent with his testimony, evidence that he has at differ-

\* 55 Barb. 293.

† 17 Barb. 489.

ent times made statements similar to what he has testified in the case, can not be received to fortify his testimony.\*

The court in *Robb v. Hackley*,† stated the following principle and opinion :

But as a general and almost universal rule, evidence of what the witness has said out of court can not be received to fortify his testimony. It violates a first principle in the law of evidence to allow a party to be affected, either in his person or in his property, by the declarations of a witness made without oath. And, besides, it can be no confirmation of what the witness has said on oath to show that he has made similar declarations when under no such solemn obligation to speak the truth. It is no answer to say that such evidence will not be likely to gain credit, and consequently will do no harm. Evidence should never be given to a jury which they are not at liberty to believe.

In *Taylor on Evidence*, vol. II, sec. 1330, it is substantially stated, that evidence showing the witness has, on similar occasions, made similar statements to what he has testified to in the case, is not admissible, unless the witness be charged with a design to misrepresent in consequence of his relation to the party or to the case, in which case it may be proper to show that he has made similar statements before the relation existed.

The same line of reasoning enunciated by Mr. Taylor in his work, may be found in volume I, page 586 of Mr. Greenleaf's work on Evidence. The point in question was quite directly passed upon in the case, *The People v. Vane*,‡ where the testimony of an accomplice had been impeached by the suggestion that he was inspired by a hope of pardon and immunity, and that it was competent to relieve his evidence from the suspicion, by proving that on previous occasions, antecedent to the time when this inspiration of hope operated upon him, he had made similar statements.§

In *Smith v. Stickney*,¶ a witness was asked if he had not

\* See *King v. Parker*, 3 Doug. 242; 1 Phillip Ev. by Cowen & Hill, pp. 776-9.

† 23 Wend. 50.      ‡ 12 Wend. 78.

§ *Vide*, *Robb v. Hackley*, 23 Wend. 50; *Powell on Evidence*, Mar. p. 60; *People v. Hulse*, 3 Hill.

¶ 17 Barb. 189.

said out of court that he was jointly interested with his brother, the plaintiff, whereas he testified in court that he was not; and several witnesses were called to show that he had made statements, the import of which was, that the work was done under a joint contract by the witness and the plaintiff. It will thus be seen that the case came directly within the rule.

The case of *Robb v. Hackley* was cited by both sides in the argument. The plaintiff's counsel read the following from the judge's opinion in that case :

Proof of declarations made by a witness out of court in corroboration of the testimony given by him on the trial of the case, is, as a general and almost universal rule, inadmissible. *It seems, however, that to this rule there are exceptions*, and that, under special circumstances, such proof will be received. As, *where the witness is charged with giving his testimony under the influence of some motive* prompting him to make false or colored statements, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So, in contradiction of evidence tending to show that the account of the transaction given by the witness is a fabrication of late date, it may be shown that the same account was given by him before its ultimate effect and operation, arising from a change of circumstances, could have been foreseen.

It is generally conceded as a settled and wise rule of evidence in England and in this country, that when the credit of a witness is impeached by evidence that he had said something at another time inconsistent with what he has now sworn, this may be rebutted by proof of other declarations by him in conformity to what he has sworn, because, both being under oath, one is as good as the other, and the jury will judge of his credit on the whole. This principle has been enunciated by the Supreme Court of the United States.

The circumstances of the application under consideration did not present facts showing that a witness had made statements out of court to the contrary of what she made in court, and as that is the principal exception of allowing such testimony (in the nature of hearsay testimony), and as it would be opening the door to a very wide range of evidence in violation of the safer rule, the judge, doubtless believing in the principle of *stare*

judge, doubtless believing in the principle of *stare decisis*, deemed it wise not to admit the proposed testimony.

The learned and faithful chief justice, in passing upon the question, took occasion to say that, if averments made by the defendant's opening counsel had not been proved they would go for nothing, and that the observation of the defendant, after having answered the question, was a mere opinion and that he should instruct the jury not to be carried away by any such proposition that the wife (the witness, whose statements were endeavored to be introduced as having been communicated to her uncle on the 2d day of June), was overshadowed and under the control of her husband—a "demoralizing theory unworthy of a court of justice." The court having denied the application, the plaintiff's counsel excepted. Just four months from the time the case was opened to the jury, the evidence was fully submitted and closed, when the court adjourned for one week, to enable the counsel to rest and prepare their addresses to the jury.

Mr. Porter and Mr. Evarts addressed the jury for the defendant, and Mr. Beach for plaintiff.

Having had ample time to digest the salient points and prepare his argument, Mr. Porter opened his plea with much freshness, vigor and earnestness. He portrayed in lively contrast the characters of the plaintiff and defendant, and declared at the outset, that men were apt to be bold of speech "when two stalwart champions like Tilton and Moulton make a joint assault upon a clergyman and a woman, the one forbidden by his profession to return evil for evil, the other weak, powerless, held as in the hollow of the hand by a man who had but to look upon her to subdue her to his will." And so running through a speech of five days he was bold and bitter, launching his fiery invectives against the plaintiff and his witnesses—which at times must have burned deeply into their consciences, if they be unfaithful and dishonest. Conspiracy, blackmail and perjury, were charges made, and he pronounced the plaintiff "hollow, treacherous, false, cowardly, base!"

Neither epithets nor denunciation rise to the dignity of ar-

gument, and it has been regretted that the defence felt constrained to indulge in them so largely.

Mr. Evarts, in an address at greater length than his associate, presented much moral reasoning and many rhetorical figures, and skilfully endeavored to illustrate that, in fact, the plaintiff was on his defence. His style was classical and finished throughout. He referred to Horne Tooke's remark that he didn't see why a man should not thank God for his self-conceit—applying the comparison ironically to the plaintiff. He contended that the plaintiff was possessed of envy and malice, extending through the whole frame of his moral and intellectual nature; that the ancients had a stern maxim marking the absoluteness of the dominion of this evil passion in few words—*invidia festos dies non egit*—envy, malice, keep no holiday. It finds its complacency, its occupation, its goading impulses in the destruction of that prosperity and superiority. He declared that men of these evil dispositions had lived long before this age:

Why, the companions, the instruments, the agents of Catiline were of the same kind. They were long ago described—these men, Tilton and Moulton—by a great advocate much better than could I describe them, although what he said was said 2,000 years ago, and of others. *Hii pueri, tam lepidi ac delicati, non solum amare et amari, neque cantare et saltare, sed etiam sicas vibrare, et spargere venena didicerunt;* these youths so jaunty and so slick, not only practiced the arts of freely loving and freely being loved, the graces of an airy rhetoric and a bold gesticulation, but also have they learned to ply the dagger of the assassin and scatter the poisons of calumniators.

While Mr. Porter may be said to have been structural and histrionic, and Mr. Evarts synthetic and philosophical, Mr. Beach built splendid columns and advanced them with a garniture as only a master in forensal expression can.

The counsel for the plaintiff closed with a pathetic peroration, in the course of which he said:

Weakness is strong in the energy of truth. I have no faith in my own skill, but I have abiding hope in the supreme justice which governs the world, marking the sparrow as it falls. On the great seal of your city is engraved the noble motto, "Right makes might," and on any day of public celebration it shines upon the flag which is flung out from the dome of your city hall. It is this sentiment that encourages and



strengthens weakness in its contests with arrogant strength. It is the sentiment which has sustained my client in all the difficulties and discouragements of this contest, and it will sustain and eventually, I trust, redeem him, because it bears the promise of Him whose words shall never fail. No man venerates more profoundly than myself the magnificent genius of this defendant. His large contributions to the literature of the times excite the sentiment of which Macaulay spoke in his essay on the life of Bacon. Rich as he is in mental endowments, prodigal as his labors have been, they can shelter no offence against the law. Genius as lofty, learning more rare and profound, could not save Bacon. He sinned and fell.

The counsel in closing rendered with happy effect the poem of Whittier, entitled "Ichabod," which portrays the deep disgrace of a great man who has fallen; and he also quoted Webster's eloquent words upon the duty of a jury—declaring that there is no evil that we can not either face or fly from but the consciousness of duty disregarded.

Plaintiff's counsel made motion to reopen the case to admit newly-discovered evidence, but the court, upon examining the papers presented, denied the motion.

The charge of Chief Justice Neilson was then read to the jury. It was clear, able, dispassionate, comprehensive, an analytical digest of the law bearing upon the facts in the case. In the course of his charge he referred to the writings, to the oral admissions, to the tacit or implied admissions, and to the general conduct of the defendant as evidenced in the case. Referring to the writing of the "letter of contrition," he said:

While Mr. Beecher was speaking, Mr. Moulton was writing, and with his assent. It may well be that in the absence of a deliberate course of dictation he could only note, in a hurried and imperfect manner, detached and striking expressions. You will consider whether he did so in good faith or not, and with what degree of success.

But, if the circumstances were not favorable to the making of a correct report, had the writer wished to make it, neither were they favorable to the invention of what was written.

And charging upon the oral admissions, the court remarked:

The confession of a party made deliberately against his own interest, as to facts known to and understood by him, if clearly proved, are regarded as of a high class of evidence, and deservedly so, because it is contrary to experience for men to admit what hurts them, if not true. Experience proves, rather, that men evade or deny the truth when the truth hurts.

Testimony to prove oral admissions should be carefully scrutinized. The jury should be satisfied that the witness clearly understood, correctly remembered, and fairly repeated what was said. But caution against relying on such testimony too implicitly should find its counterpoise in the caution against the too ready rejection of it.

He declared generally that the question upon all the proofs was whether the defendant understood that he was charged with the adultery, and spoke, wrote, acted and suffered from and in consequence of that. If the wrong was the adultery, the solution of what followed is easy. He left it to the jury to say whether the plaintiff's testimony to the confession of the defendant's guilt could be reconciled with his previous declarations of his wife's innocence.

Upon the testimony of Mrs. Moulton, he said :

I had occasion to state in your hearing my view of the suggestion that this witness testified at the will or on the instruction of the husband. I still hold to the opinion then expressed. There is no proof of artifice, or coercion, or undue influence.

As to the position of Mr. Tracy in the case, the court added that its view of the propriety of the course pursued by Mr. Tracy agreed with that of his associates in the cause—that there was no violation of professional duty.

The charge was closed in the following words :

Gentlemen, the case is now submitted to you. It is of a nature to call for the exercise of your highest intelligence and most scrupulous care. You will retire to your deliberations with an impartial and earnest purpose to be just to the witnesses, just to the parties, and to render a verdict which you may think of hereafter with satisfaction, as a duty honestly performed in the presence of God and of men.

Immediately upon the charge being closed, Mr. Abbott, the very able searcher-out of law and the brief-maker for the defence, presented fifty-four requests to charge, fifteen of which were charged as matter of law, ten rejected as improper, and the rest passed over as matters for the jury.

The case went to the jury on the afternoon of the 24th day of June, and thousands of hearts waited anxiously for the verdict.

Whichever way the trial may terminate, it must occur to the thoughtful mind that the homes and firesides of the community, if not of the world, have doubtless received from

the developments in this trial, a shock and a moral taint and tarnishment that can hardly be repaired or eradicated.

In contemplating this unfortunate drama—where virtue seems to have been thrown from its eminence—which is fraught with the deep pathos and solemn rhythm of tragedy, we are reminded of the apposite and eloquent words of the Elizabethan dramatist, Chapman, in his play, "Bussy D'Ambois," where man is described as being "a torch borne in the wind," a dream but of a shadow, summed with all his substance; and where is drawn the simile of a great seaman, skilled in Neptune's deep invisible paths, who, as he nears the port requires the aid of a pilot—"that never past his country's sight"—to guide him in; to men of great renown and distinction requiring virtue :

So when we wander furthest through the waves  
Of glassy glory and the gulfs of state,  
Topped with all titles, spreading all our reaches,  
As if each private arm would sphere the earth,  
We must to Virtue for her guide resort,  
Or we shall shipwreck in our safest port.

In presenting this brief history of the facts of the case, and the law points that have been raised and discussed during the trial, with a bird's-eye view of the court and counsel, we have faithfully endeavored to state the premises as we find them, and such generalizations and deductions as have occurred to us. In this case let the calm judgment of the people, which is in the main wiser than that of the individual, wait patiently for the verdict—as upon it will hang the weal or the woe of myriads of hearts—and at the same time judge all with charity.

NEW YORK.

JOHN F. BAKER.

[On the 2d of July the jury reported to the court that it was impossible for them to agree, and they were thereupon discharged. It is understood that they stood three for the plaintiff and nine for the defendant. It is reported that both parties profess to consider the result a moral vindication. We trust they will remain of this mind, and spare the public a repetition of the trial.—Ed. S. L. R.]

*VII. JURY TRIALS.*

We are assured by high authority that the dragon, that serpent, which is the Devil and Satan, is to be bound a thousand years—for which thanks! Hasten the day! And then, besides, we are further assured that though after that he must be loosed, yet only for a little season—for which, other thanks! Yet, perhaps, it were well to remember, meanwhile, that somehow little devils are every day generated, and grow frightfully fast in this cold country of ours. It is but a month or two since one such was convicted of a murder in Boston, which he committed simply from the love of killing,—his counsel, at the argument, strangely enough, relying mainly on the fact that the young murderer had had the advantage of the Boston schools, and especially of Sunday schools, as evidence of defective organization as distinguished from acquired savageness. The jurors, however, more sensible, no doubt thought, that whether this strange love were natural or acquired, so proficient a scholar of the Sunday school, among his other learning ought to have learnt better than to make murder a pastime,—and so, after a quite brief consultation, returned a verdict of guilty of murder in the first degree. This little fellow was and is—since, as I write, he still lives by favor of the governor—undoubtedly a devil of the first-class—a devil uncommon—of the class A. 1. Yet I have known something and read much of others, one or two at least, conspicuous instances, in our country, as thorough-faced as he in all departments of wickedness, and much more so in the province of lying, who ought to be classed A. 1 extra, and who, notwithstanding, have gone to their graves, and where else I know not, with such military and other show as has been accorded to few honest men.

The second class, a milder type, the knavish simply, is the most common. They are, moreover, the best educated. A railroad, for instance, is contemplated, to locate, construct,

maintain and operate which, a company is chartered. Directors of the company are chosen. It might be supposed these directors would employ skilled and competent persons to build their road. But that has been found not to be the way to do it—or perhaps not the way not to do it. The way is, it seems, to organize or procure to be chartered a company to build railroads. This is done. Directors of the construction company are chosen. Noticeably, they are the same men who are the directors of the railroad company. Noticeably, also, they are the chief stockholders in the construction company. As directors of the construction company, they contract with themselves as directors of the railroad company to build the road. Neither company has any money. But that matters not. The same men are on both sides of the bargain. The means are to be provided from the bonds of the railroad. The bonds are made by the directors of the railroad, and are to be delivered by them to themselves as directors of the construction company, at \$25,000 per mile, as the work of building the road progresses. What could be fairer? Meantime, however, it is deemed best to try these bonds on the market. The double directors are eminently *respectable*! Educated, some of them at least, at Harvard College, living on Beacon street, and owning lots at Mount Auburn; one of them, I believe and he not the first such, having endowed the college—what other certificate of respectability could be required or expected? The trial is successful; the bonds are sold; the proceeds?—respectability only knows where they have gone to; the road is not built, nor soon will be; the bonds in the hands of innocent parties, are utterly worthless! Oh, respectability, what disreputable acts are done under thy shadow! Devils of the second class. Another case fit to be dealt with only by jurors.

In view of all which, and much more of similar sort, it seems worth while to notice the attempts that have been made within the last ten years or so to get rid of jury trials. Suspension of habeas corpus, force bills and the like measures, are necessarily conspicuous. They fall under the notice of the observant and the unobservant. Violent acts of fierce and shameful

men, everybody understands, they can last no longer than these bad men retain control of the government. But the attempts made in some of the New England states to get rid of jury trials in civil causes are of a different character, and much less likely to attract considerate attention generally. Yet the tendency and first result of these, it seems to me, if successful, must necessarily be to centralize power in the administration of government; and the last result, injustice to the individual. They seem to me to be the beginning, the progress and end of which is evil; and therefore I regard them not without concern. Happily, there is in each state constitution a provision that, except only in certain cases in which, at the time of the adoption of such constitution it had been otherwise practiced, the right of trial by jury shall forever remain inviolate; so that it can only be dispensed with by consent of parties. The attempt has been to procure that assent; at first by an express, and afterwards by an implied waiver.

The first act in Massachusetts having in view the trial of causes without jury was passed in the year 1857. It provided that in all civil actions, trial by jury might be waived by the consent, in writing, of the parties, and thereafter the cause should be tried by the court. That act is in force still. At each term since its passage, a few cases have been tried by the court. But I think it safe to say the mode has been unsatisfactory; and only cases in which there is not much dispute as to facts or where there are some peculiar circumstances about the case, are put upon that list. Sometimes a party, finding his case forced on to trial when he is unprepared, takes that way out of the difficulty, but not quite willingly. Perhaps the best evidence that the plan did not succeed is, that it did not answer the ostensible purpose; namely, relieve the trial docket. Absolutely certain it is, it has never been a favorite mode of trial.

Meantime Connecticut has been moving in the same direction. The first legislation to that end in that state, I believe, was in the year 1868. It was then enacted that upon the request of either party to certain civil actions, made during the first or second term in certain courts, and the first term only

in others, such actions should be entered on the jury docket, and that all cases not so entered should be entered on the court docket, to be tried and disposed of by the court. It was still further enacted, that whenever parties should join issue upon a matter of fact and put themselves upon the court for trial, the court might appoint a committee to hear the evidence and make a finding upon the same. How these provisions have met expectation in Connecticut, I am not able to say, but to me they look alarming.

In the year 1874, still moving in the same direction, the legislature of Massachusetts enacted that no civil action shall be placed on the jury trial list unless one of the parties within twenty days after the action is at issue, shall file a demand for such trial in writing. The pretext for such legislation is the delay, and by consequence great expense in the determination of causes,—in which there is indeed some truth. The result is, in every county in Massachusetts, I believe, certainly in Suffolk and in Middlesex, the lists of cases awaiting trial were never so large as now. But the delay is not caused by want of promptness in jurors. The fault is not theirs at all.

Besides; no man of sense who has a case worth trying but wants it well tried, whether it takes a month or a year to try it. An early determination is not of so much consequence as a right determination. And among all the complaints of delay in trials, I have never heard any such complaint made against a jury. Nobody could doubt, if he were to try to, that it would be a saving of time and money if the legislature of Massachusetts, composed of above four hundred men, sitting annually at Boston from the first Wednesday of January to the middle of June, to make, un-make and re-make laws for the state, were to consist of only five-and-twenty men. Possibly, also, such five-and-twenty men might not only make, un-make and re-make as many such laws, but make, un-make and re-make them as well—and in much less time. But it has not been found, nor is it believed to be, the satisfactory way.

Moreover, no judge, in my judgment, can ever find the facts of a case so well as a jury. "Trial," says Lord Coke, "is to find out by due examinations the truth of the point in

issue or question between the parties." Now, there probably is not one case in fifty tried where the facts are agreed. It very rarely happens that the witnesses on both sides state the transaction alike. It must also be said, that there is sometimes downright lying on one side—possibly on both; and if not downright lying, then a suppression, sometimes wilful and sometimes by mistake, of part of the truth. And it is true and must ever be true, that in any such case, twelve men selected by the town or city authorities, from the inhabitants, as well qualified to sit as jurors, "being men of good moral character and sound judgment and free from all legal exceptions," and so sitting, are better able to detect falsehood and nonsense and the suppression of truth, and by a comparison of judgments to reach the truth, than any single judge is, or probably ever will be. The result of my observation is, that the jury are oftener right in matters of fact than the judge.

Again, the party against whom the fact is found is better satisfied when the determination is by a jury; and what is of still greater moment, the results of dissatisfaction if there be any, are less injurious. If the losing party speaks ill of the jury, they soon cease to be jurors; the same twelve never meet again as jurors; he probably does not know how at first they stood, nor perhaps on what ground they decided against him; he acquiesces and bears them no hostility. Not so with respect of the judge. The verdict is his alone; and it is remembered against him. He is of course, a fool; perhaps also suspected of having been bought up by the other side. He dined with opposing attorney. The judge is honest and is not sensible of suffering from the unjust criticism. But the court does suffer. It loses a part of that respect which is its due and which is essential to the due administration of justice. When Judge Sprague wrote to the state department at Washington asking for a better court room, there was sense and fitness in his observation that,—“no court which is held in a pigsty can be respected.” But what if the judge has really found a wrong verdict? It seems to me better, both for parties and court, that the judge should stick to the law and leave the facts to be found by the jury. Facts are not his province. In



that province he is liable to make mistakes. He is not usually a good detective. He can hardly be that and a good judge too. And in taking upon himself that service he loses the respect, at least, of those who are better skilled in it than he. One who has not been much in court can hardly realize how important it is, that a judge should not only be really great and pure, but that he should be deemed to be so. I had a military friend once who used to tell me, what I knew before, that he really knew nothing of military affairs, but, said he, other people think I do, and that stands me instead. Doctor Johnson said,—“A judge may play at cards a little for his amusement, but he is not to play marbles or chuck farthing on the piazza.”

Still further. Neither under the acts of Connecticut nor the late act of Massachusetts, is there any assurance that the judge will find the facts. In Connecticut, he may send the case to a committee of his own appointing, for that purpose, and in Massachusetts he may send it to an auditor,—in which latter case, practically, the finding of the auditor will be the finding of the judge. The auditor's report will probably be taken as conclusive.

More than all. If it is true that justice is unreasonably delayed, a safe and sure remedy for such delay may be found in constituting new courts and increasing the number of judges and juries.

Since, therefore, there is no great or other exigency requiring this change; since trial is to find out by due examination the truth of the point in question between the parties, whereupon judgment may be given; since when the judges undertake to find out this truth, whether they succeed or fail, they thereby lose a part of the respect due to the courts, and which is essential to the due administration of justice; since, also, the judges are less competent than juries to find out this truth, and therefore not unfrequently fail in the endeavor, and thereby do injustice to parties; since juries are not only competent in fact, but are also deemed to be competent to find out the truth, and since the verdicts are generally satisfactory, and delays may be avoided without dispensing with them—there seems

no reason for yielding up that which has come down to us, adopted and improved by the Great Alfred, and which, not only in respect of life and liberty, but also where reputation and property only are concerned, has, in England, been said with pride, to be "the distinguishing privilege of every Briton, and one of the most glorious advantages of the British constitution." Especially is not this the time to experiment in such quackery, when, not only in Washington, but also in Boston, so many are not ashamed to lie; and old men, rich and in some sort educated, and called respectable, are detected in questionable or unquestionable practices, and seem to have made up their minds, such as they have, as Sir Thomas Browne says, to leave it disputable at last whether they have been men.

S. J. THOMAS.

BOSTON, MASS.

### *VIII. BREVITY IN THE REPORTS—SOME FRENCH DECISIONS.*

There are probably but few wants of the American bar which are more general and pressing, or which are more universally disregarded, than that of a systematic condensation of our reports of decided cases. The present unparalleled and dreary extension of the verbiage of the law is nothing less than a serious and damaging evil. Our volumes of reports multiply beyond the means of lawyers and beyond the capacity of readers. Many of these volumes contain but few cases and little or nothing of general importance; but if you have once begun to buy a series of reports, you are under a sort of necessity of continuing to buy; broken sets have an odd kind of look, and unless one has the latest volume he knows not but that some day he may be trusting the interests of a client to the hopeless security of an overruled case. One prevailing cause of the increasing number of these volumes is found in the custom of reporting many useless cases, cases which turn on questions of fact, or which merely re-assert familiar principles of law. Besides, there is the notorious fashion of padding the reports with briefs, without regard to their value. This belongs to the art of book making which may be said now to have reached its highest perfection of abuse.

But, doubtless, with due respect be it said, the courts themselves often set a bad example. Pascal said that he would have made one of his Provincial Letters much shorter if he had had time. But the courts will not take the time. Too often, indeed, they are overworked, and write not as they would, but as they must. And so it is that transcripts, documents, depositions, instructions, useless dates, passages from other law books, and all kinds of incongruous and heavy material are embodied in an opinion. A good deal of this is done mechanically, and the court leaves it to the reader to sift and digest

the whole as best he may. But it may be said of such opinions, as was said of Lord Kames' *Elements of Criticism*, that it is easier to write them than to read them. No amount of learning or research can compensate for this great wrong, which is an attack on the lives of the profession, since life consists only of a definite amount of time. But the older the world gets, the more serried become the duties of life, and the smaller the leisure, the longer the opinions grow. Courts have now not only to decide the law but to reconcile it with whatever any one else has said about the law, or to show wherein he is wrong; and thus they spin out their opinions until we are "in wandering mazes lost."

Law is a science, and usually the language of science is brief and terse, leaving much to be supplied by the culture and capacity of the reader. Amplification is the foe of precision. In hardly any science, except in those of law and theology, will prolixity be tolerated, or fine writing, as commonly understood, be allowed. In the former they are not only blemishes, but are serious hindrances. The writing that is addressed to lawyers is for a busy and timeless generation of men, if any such there are. A client of any intelligence feels this when he enters a lawyer's office, or when he writes a letter to a lawyer. One would think that the courts would also have a realizing sense of this fact. The conditions can not be changed. The long and labored opinion is consigned to oblivion. The brief head-note tells the story of the discrepancy between the bread and the sack. The overtasked lawyer would fain read, and read it all, but it is simply out of his power. He defers the full consideration of the judicial language to some more convenient season, some casual leisure, some chance holiday that never comes. If the chief object of writing be not a kind of self-communing, but that what is written may be read, here then is a case of a failure, unattended with a single consoling thought. It is not meant here to be understood that the decisions of our highest courts should consist of mere announcements of legal conclusions. This would be an error in the other direction. But only those facts need be stated which are necessary to show how the law is applied. Usually

they may be profitably reduced within very narrow limits. Neither has the profession anything to do with conflicting evidence. The conclusion of the court as to the facts is that alone by which the law is shown forth. Neither can it be needful to dwell on the known fundamentals of the law, or always to trace a principle back to its remote beginnings; nor to cite authorities to maintain a position which no one would dispute. Some things the reader will take for granted, and needs not to be told that every one is presumed to be innocent until the contrary is proved. It is not to the reports that men go in these days to learn elementary principles.

In the midst of the general surfeit, the book-sellers every day offer new volumes of reports with a flourish, as if they were offering bread to a famished multitude. The rare fecundity of books has well-nigh swamped the vanity of the reporter. His name has declined from the back of the volumes. In the vast number of books the name was no longer a mark of distinction, as many reporters would have the same name. The cause of this great expansion in book-making is found, more than anywhere else, in the great quantity of repetitions and the extravagant diffuseness of the reports. The contents of some of the English volumes of reports, if reproduced on the present plan of book-making, would make a considerable library.

The text-writer and the digest-maker, seeing the hopeless condition in which the practitioner is thus placed, intervene for his good; they afford him an aid which is indispensable, but the tendency on the whole is not to elevate legal science. They are the great lawyers who are informed by the reason and spirit of the law, and these are not communicated readily by barren compends, which deal with abstractions. What the student needs to know, is not so much the dry skeleton of the law, as the law endowed with life, ministering to the wants and necessities of mankind; not a mere potentiality, but an active agent, the strongest and most persistent of all the operative forces of organized society.

It is almost as difficult to learn the science of law thoroughly from mere text books, as it would be to learn botany from

the dry plants of an herbarium. It is in the actual trial of causes as seen in the courts and read in the reports, that we can best perceive the subtle elements of which the law is composed. Here it is that we see not only what the law is, but the necessities which shape its existence, that which is behind the law, not only explaining it, but accounting for it. Here it is, too, that we find the individual and human element which interests and produces a more lasting impression. We see in the working up of the case how the fixed principles of the law displace a multitude of false and untenable theories, some of them being so nearly correct as to make it extremely difficult to distinguish error from the correct rule. The reports not only disclose legal principles, but they show the order of their development, and exhibit the history of law. Tediumness in the reports tends to drive the profession away from the best source of learning, and compels them to rely on secondary and inefficient materials, and thereby lessens that thorough culture in which the chief wealth, ornament, and utility of the bar consist. The opinions in the great leading cases in England rarely extend beyond two or three pages each, and most of them are still more brief, and yet they are not wanting in forcibleness or clearness. Cases which are not leading might well be foreshortened in proportion to their want of importance. Sooner or later the work of condensation must begin. Our long rows of reports can be profitably condensed into a very few volumes, and to this end they must come. In their last state they will be more convenient and useful than in their first; but what labor must in the meantime be endured, what hindrances must be combated. If the condensation were made in the first instance, the work would be better done and would be lasting.

What immediately gave rise to these reflections, which have occurred, doubtless, to every lawyer, was an examination of some recent French decisions in the *Jurisprudence Generale*, a periodical containing about seventy pages a little larger than those of the *Central Law Journal*. The number in question contains over a hundred cases, in all of which the opinions of the courts are given in full, and in more than three-fourths

of the cases the opinions, both of the lower and the appellate courts, are produced without abbreviation. As might be supposed, these opinions, or judgments, as they are called, are models of brevity. In them is no idle verbiage, no rhetorical effort to distract the attention of the reader, there is no loophole through which the individuality, perhaps the vanity, of the judge is seen, no affectation of learning, no looking over into Lapland for what is obviously just at hand, no broad and hazardous generalization doomed to beget future cases, and which future cases must rectify, no illustration by separate cases which should be set down for separate argument, no prurient desire to say all that can be said. The court confines itself closely to the exact question involved, and speaks with the impersonality of the law. If an American should find here a dearth of citations, he would also discover a fine lack of useless remark, and a painstaking application of legal science. If in noticing some of these cases, they should not seem to quite come up to the warranty here given, the reader will properly lay the fault at the door of the translator. Many of the decisions are interesting in themselves, and are not inapplicable to similar cases arising under our laws. Indeed, in most commercial matters the laws of France are hardly different from our own. There is also a much greater resemblance in the other branches of law to our own than would be generally supposed. During feudal times the laws of England and France were nearly the same, and the civil law has been largely adopted in the former country as well as in the latter.

The longest opinion in the periodical referred to, is as follows:

#### WEHRLIN V. PHENIX INS. CO.

##### *Court at Nancy.*

1. Where a policy of life insurance stipulates that the premium shall be paid at the office of the company within a certain period of grace, otherwise the policy to be forfeited, it must be held to be so payable at the office of the company, although some payments of premium have been paid at the residence of the assured especially when the assured, being always behind in his payments, has been frequently notified to make payment at the office.

2. In such case the non-payment of the premium within the time limited will amount to a forfeiture, although no formal demand for the premium has been made.

3. And the forfeiture can not be avoided by an allegation that the company had

not forwarded to the local agent, whose business it was to receive the premium, a proper receipt.

After having made a first contract of insurance on his life, on which his widow and children have received 35,000 francs, Joseph Wehrlin obtained a contract of insurance from the Phenix Insurance Company for 25,000 fr., in consideration of an annual premium of 1,143 fr., payable in advance, one-half on the 30th December, and the other half on the 30th June, of each year. Wehrlin having died on the 19th April, 1871, without having paid the premium which fell due December 30, 1870, the underwriters refused to pay the insurance money, basing their defence on article 3 of the policy, by the terms of which the premiums were to be paid "at the office of the company within thirty days, at least, after the time that the same should fall due," in default of which the policy should be void, without the necessity of any suit or demand. The widow and children of Wehrlin deny the forfeiture on four principal grounds, to-wit: That by the conduct of the company the contract had been abrogated in two of its essential conditions, so that the premiums, which at first were payable, became demandable: That the company in granting delays to Wehrlin had renounced the right to enforce article 3 of the policy; for the absence of a demand for the purpose of establishing a formal refusal of the insured to pay the defaulted premium; and because the company had failed to send to her agent at Nancy the receipt which was applicable to this premium.

As to the first and second grounds. Article 3 of the policy is thus conceived: "This assurance shall be of no effect until after it is signed and the first premium is paid; but the payment of other premiums is optional. The contract will not remain in force unless they are paid at the office of the company on the days named, or, at least, within thirty days afterwards. In default of such payment within the term here named, the policy shall be void, and the premiums which shall have been paid, shall become the property of the company without suit and without demand; but in such case if the premiums of the first three years shall have been paid, the company shall pay the assured the value of his policy as of the day of the default."

The sense of this article is clear, its stipulations are formal and lawful; the payment of the first annual premium only being obligatory, and those following optional, the assured was free not to pay them, and the company had nothing to exact of him, but he is to be regarded in that case as renouncing the benefit of his contract, and thus he incurs, by mere force of law, and without demand, a forfeiture on non-payment within the thirty days allowed. There is nothing in this result but the just application of general principles of law, since on the one hand the law allows one to make himself a debtor by mere delay beyond a term, and on the other hand the contract of insurance is both mutual and conditional, and the insurer could not, without injustice, remain bound to a



risk whilst the assured on his part had ceased to comply with his engagements. These conditions, it is true, may be deemed a little hard; but it is for the assured to weigh well and measure his strength before contracting; and the rigor of the situation is somewhat tempered by the obligation of the company, after the payment of these premiums, to account to the insured for the value of the policy at the time of its determination. These contracts are in the place of the law to those who make them, and they can only be revoked or modified by mutual consent. The facts which are invoked to prove their abrogation should be the more significant and distinct, because the renunciation of a certain right, not being presumed, the doubt, if any feeble doubt should exist, should be interpreted in that sense which will allow the contract to subsist, and not in that which will break it. On the whole, the widow Wehrlin is unable to invoke any fact, any precedent, from which the renunciation of article 3 of the policy can be implied.

As to the third ground of the absence of a demand and insufficient verification of the refusal of Wehrlin to pay. It is true that a debtor is not to be considered as in default by an extra-judicial act, unless by the terms of a contract, but in this case he is placed in default by the very terms of the policy, whose stipulations are of the most positive and energetic character. In such case to put the insured in default by bringing suit, or any equivalent act, would have been not only superfluous, but would have been even incompatible with the nature of the rights of the company. It must be remembered that the payment of all the premiums except the first was optional with the assured, that the company could not exact it, and that being thus deprived of action, it could not sue, since that would imply the right of constraint. There was no obligation which could possibly rest on the Phenix beyond that of giving a simple notice, of demanding officially the premium which was due, so that the insured could pay if he chose not to renounce the insurance. Far from failing in this duty, if such it was, the company on the contrary, satisfied it in a large measure. Actual notice was added to the incessant demand resulting from the contract itself, the effect of which could only be suspended by an extension of the conventional delay for a fixed period, an extension which Wehrlin neither solicited nor obtained. These circumstances place the case in a clear light, and sufficiently establish the refusal or inability of the assured to pay the premium.

As to the fourth ground, the failure to send the receipt to Nancy: It matters little to know whether the general manager of the Phenix sent the receipt for the premium to Nancy before the death of Wehrlin or not; this fact, which appears to be doubtful, could not exercise any influence on the litigation. The local agent would certainly have had a right to give at least a provisional receipt on the payment of the premium, to be afterwards exchanged for one coming from the general manager.

Therefore the appellee can not find in the circumstance of the failure to send the receipt from Paris to Nancy any legitimate excuse or plausible pretext to justify the default of payment of the premium by her husband.

The argument for the widow Wehrlin, if sanctioned by the tribunals, would tend to results as unjuridical as they would be contrary to the essence of the contract of insurance. In effect, the insurer, deprived of the right of exacting the premiums which are made purely optional, would still be abandoned to the discretion of the insured, would be constrained to endure the risks, while the other would run none at all, and might withdraw himself during an unlimited time from the execution of his own engagements; consequences as unacceptable in law as in equity; which demonstrate the fallacy of the principle which serves as a basis for the claims of the appellee. The company would not lose her right of forfeiture unless she had by her conduct in according respite to Wehrlin kept him in a deceitful sense of security, and thus had caused the forfeiture to be incurred; but the appellant is sheltered from all reproaches and insinuations of that kind. For these reasons the judgment must be reversed.

The next is a criminal case and rather a sad one. A man named Couche having become furiously insane, his children and step-children reported the fact to the mayor of the commune, who took the proper steps to have him sent to the departmental asylum; but as, in the meantime, delays in obtaining the proper orders must occur, and there was no suitable building in the vicinity where the maniac could be confined, the children offered to keep him in an out-house of some kind. After confining him in the building they deemed it necessary to wall up both doors, leaving open only a barred window. The opinion of the court of appeals explains the rest.

It appears positively from the evidence of medical experts that the want of proper care was one of the determining causes of the death of Couche. In accepting from the municipal authority the charge of taking care of their father so as to prevent him from harming any one until proper measures should be taken by the prefectural authority for his keeping, the accused at the same time assumed the obligation to keep watch over the welfare of the poor madman and to extend to him that care which his situation demanded. If security required that grates should be put in the window, or even that one of the doors should be walled up, the necessity of communicating with him in order to minister to his most essential wants forbade that the other door should be permanently closed. In acting otherwise, and in suffering their father and step-father to be exposed to the coldness of the nights, and to the exasperation which was

provoked by this complete seclusion, the accused have violated the most elementary rules of prudence, and have involuntarily contributed to the untimely end of their parent. But it is necessary to give them credit for the good-will which they showed in the beginning, in coming to the aid of the municipal authority which was seeking for a place in which Couche might be confined, and in afterwards offering, notwithstanding their condition, bordering on indigence, to contribute the greater part of the expense of the confinement of their father and step-father. We must also regard the fright which, in their ignorance, they experienced in view of the responsibility which they had assumed towards the public. These are all extenuating circumstances which should go to the benefit of the accused.

The mayor was also tried, but was let off with a reprimand. It seems to have been a case of awkwardness all around.

One curious case is reported which fortunately can not occur in this country. The plaintiff had made a contract for printing advertisements in a newspaper, and before the term of the advertisements had expired, the newspaper was suppressed by the military authority acting under a statutory power, and the plaintiff sued the publisher for a breach of the contract. The plaintiff owned that the defendant had been deprived of the power of performing the contract by the *vis major* of the act of the government, but contended that the presumption was that the government had acted properly, and that, therefore, it was by the fault of the defendant that his newspaper had been suppressed, and that, seeing that he could not take advantage of his own wrong, the defendant was estopped from availing himself of the defence of the *vis major* resulting from his own wrongful acts. The court disposed of the question as follows :

By agreement the parties have recognized the fact that the only cause of the failure to keep the agreement as to the advertisements in the journal called *Republican France*, was the interdiction of the journal by the order of the general commanding at Lyons during a state of seige, of date July 10, 1873. The power conferred by the law of August 9, 1849, on the military authority during a state of seige to interdict publications which are deemed to be of a nature to excite or to keep alive disorder, is sovereign, independent, uncontrolled; it can be exercised in the most absolute manner in considering the state of the public mind, and the necessities of the time and place. This power is exercised in a matter relating to political and executive law, and not to the civil and ordinary

law. Everything in such cases depends on slight shades, which may have a great importance according to the circumstances. These orders of interdiction are above all of superior administrative power, measures of order, of public safety, not decisions properly so called. They do not imply *ipso facto*, and necessarily, a crime or a fault on the part of the authors of the interdicted publication, but only a necessity for a guaranty of the public safety. These principles being admitted, the tribunals must regard these orders as far as concerns the performance of private contracts, as the acts of the king, the *vis major*. On the one hand they could not accept these interdicts without examination and without control for a basis of their judgments as implying always and necessarily a fault, for that would be to abdicate their independence. On the other hand they could not take cognizance of the causes of the interdicts, unless they examined and reviewed the motives of the interdicts, which would be an infringement of the rights of the executive authority, and an attack on the principle of the separation of the powers of government.

Besides, the plaintiff, when he made the contract for the advertisements, knew the tendencies of the journal, and the objects of its publication ; and thus he accepted the uncertainties of the situation.

The decision will recall to the reader the case of *Luther v. Borden*, in 7 Howard.

In another life insurance case the policy was made payable to the heirs or assignee of the assured, or to any one he might name by endorsement on the policy, he having at the date of the policy one child. On the death of the assured the child claimed that the policy should be paid to him, and that it should not go to the creditors of the assured in due course of administration. The lower court held that the amount of the premiums paid by the assured with interest should go to the creditors, on the ground that he was insolvent when they were paid ; but the court of appeals reversed the judgment, because the heir, taking as such, is responsible for the debts of the ancestor to the extent of the estate descended, and that if the policy was intended to be for the benefit of a third person, he should have been specifically designated. The court said, moreover, "It is contended, it is true, that the word *heirs* in this case should be taken to mean child, there being a child living at the date of the policy ; that the word sufficiently designates a person or a group of persons whom the assured wished to benefit. But this would be an arbitrary and often a hazardous construction ; for if in effect in having recourse to

insurance on his life the father of a family obeys generally a sentiment of foresight, having commonly in view the advantage of his children, it must be admitted that their exclusive worldly advantage may not be his only motive. He may have, and ought to have, equally a serious care to leave them a good name intact, and to fulfill his engagements with honor. It is more exact to say that the word *heir* corresponds rather with the idea of heredity, the continuation of the person, than the word *child*. This is the meaning which it has in judicial language, and frequently in common speech; and, in cases of doubt, it is better to keep to the literal sense of words." The court then fortified this position by an examination of the surroundings of the assured, seeing that he owed some very sacred debts, particularly to his wife, whose dowry he had wasted.

The same question has arisen in this country. In *Loes v. Ins. Co.*,\* the policy was made payable to Loes at the end of fifteen years, if he should be living; if not, "to his heirs or representatives." He having died before the time fixed for payment, his daughter and sole heir sued on the policy, and the court held that "the money was intended for the benefit of his heirs, or next of kin, and that it was not to be administered on, as assets by the executor or administrator." But under an exactly similar case it was held in *Wason v. Colburn*,† that upon the death of the assured "intestate within the ten years, his administrator who is his personal representative, became entitled, by well-settled principles of law, to collect the amount due, and hold it as part of the estate of the intestate." Mr. Bliss says of this case: "This view seems to us more correct than that adopted in *Missouri*."‡ It is not meant to be intimated that the French courts are superior in any general sense to our own. That would be simply impossible. For ability, learning, research, patient labor, and a spirit of resolute self-sacrifice, the American bench has nothing to fear from any comparison; and if objection is sometimes made to its neglect of brevity and condensation, it is only inspired by that fearful sense of the inadequacy of time as compared with

\* 41 Mo. 538.

† 99 Mass. 342.

‡ Bliss Life Ins., sec. 319.

the duties of life, which habitually dogs the American lawyer to his grave.

In examining French decisions, it seems to the writer that they are distinguishable from the most of our own by the following qualities: First, as we have seen, by greater brevity. This brevity seems to be derived from the fact that the court does not dwell on detached parts of the case, but having duly mastered the entire situation, seems to regard the cause in its general spirit and results. Thus the case, though fully presented, is presented as a whole, a distinct entity. The history of the case is perhaps none the less exact for legal purposes because every detail is not given. Second. Beyond references to the code and statutes there is no citation of authorities. The French courts are not bound by precedents. It is not hence to be inferred that the precedents are not considered. They are considered, and are supposed to be duly weighed; only the courts do not set them out as reasons for arriving at conclusions. The difference between their method of procedure and our own in this respect is, perhaps, rather apparent than real. Our own courts are compelled continually to overrule decided cases. The French courts do this *sub silentio*. They would, perhaps, deem it a reproach to their predecessors, or to their memories, to say that they had erred in the application of the law; also as a kind of egotism and breach of judicial decorum. The want of citations gives to the opinions the appearance of a more cautious weighing of all the equities of each case. The delicate consideration which is extended to the feelings of the parties, and all persons concerned, is an admirable and unfailing characteristic of the decisions, and reminds one of what was said by the great Chancellor Lamoignon, when a litigant was harshly spoken of by some member of the bar. Turning to the lawyer the judge said: "To the misfortune which this man has of having a lawsuit, let us not add that of being unkindly treated by us; we are here to examine the rights of suitors, and not to try their patience."

There is no doubt but that these decisions give evidence of great learning, unblemished by the slightest taint of pedantry

Gibbon in his History of the Decline and Fall of the Roman Empire, said that the Mahometans, as well as ourselves, are troubled with the questions of free agency and predestination, as if mankind could, under any circumstances, escape them. So the French lawyer, while he has not one book where we have a hundred, finds enough to more than exhaust the labors of a lifetime; and a brief opportunity of observing the proceedings of the French courts has convinced the writer that he relies on his precedents with something of our own delusive faith. A cursory examination of his wealth of precedents may soon convince us of the universality of legal principles; how the law adapts itself everywhere to human needs, accommodates itself often to a mere sentiment, and pursues everywhere with approval or reprobation the promptings of the human heart. Substantially the same questions present themselves in all countries and in all times; and therefore no book of the law is devoid of profit to the true lawyer. In the last number of the REVIEW there was an interesting article on the subject of Adoption. Two thousand years ago Demosthenes, in his oration against Leochares, was considering the very same question.

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### IX. THE LIABILITY OF PERSONS OF UNSOUND MIND AND INFANTS FOR TORTS IN CIVIL ACTIONS.

At common law, if we consider the remarks made by the judges, very little, if any, weight was placed upon the capacity of a person who was charged with a tort, in measuring his civil liability. In fact it seemed to be conceded that a man was responsible, in a civil action, for any injury he did to another, even though the injury was unintentional, and that, too, although he was exercising ordinary care, and the injury was the result of pure casualty. And infancy, insanity or lunacy, it seems, was no defence, except so far as to defeat a recovery for exemplary damages. Our American courts seem for a time to have followed these precedents or *dicta*, and eminent jurists of the present day refer to them as existing law.

The following cases lay down the rule at common law: *Burnard v. Haggis*, 14 C. B. (N. S.), 45; *Weaver v. Ward*, Hobart, 134; *Penrose v. Curren*, 3 Rawle, 351; *Bessey v. Olliot & Lambert*, T. Raym., 467; *Gilbert v. Stone*, Mich. 23 Car. 1, B. R.; *Fletcher v. Rylands*, L. R. 3 H. L., 330; *Lambert v. Bessey*, 4 T. Raym., 421; *Fletcher v. Rylands*, L. R. 1 Ex. 272-286; *Sutton v. Clarke*, 6 Taunt. 44; *Filliter v. Phippard*, 11 A. & E. (N. S.) 347; *Year Book*, 25 Hen. 6, 11 b., and *Year Book*, 21 Hen. 7, 28a.

In *Weaver v. Ward*, *supra*, it was held that the defendant was liable for an accidental discharge of a gun, while lawfully exercising himself at arms, whereby he injured another. To the declaration in trespass, the defendant pleaded that the injury was caused by accident, through misfortune, and against his own will. It was held on demurrer the plea was bad. The court says: "If two men tilt at tourney in presence of the king, or if masters fence and one kills the other, or if a lunatic kills a man, it is not felony; yet in trespass, which tends only



to give damages, it is not so. Therefore, if a lunatic hurt a man he shall be answerable in damages."

In shooting at butts the archer's arrow glanced and hurt another. It was holden to be a trespass. Year Book 21 H. 7, 28a.

In *Penrose v. Curren*, *supra*, Rogers, J., held that trover, detinue, or replevin would lie against an infant. Trespass, it is said, lies against an infant only four years old; 25 Hen. 6, 11, B.; but one of the judges said *quære*.

In *Bessey v. Olliot & Lambert*, *supra*, the court says: "In all civil acts, the law doth not so much regard the intent of the actor, as the loss and damage to the party suffering. As if a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies. If a man assault me and I lift up my staff to defend myself, and in lifting it up hurt another, an action lies by that person; yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed."

In *Gilbert v. Stone*, *supra*, trespass for entering plaintiffs' close and taking away his horse, the defendant pleaded that he, for fear of his life, by threats of twelve men, went into the plaintiff's close and took his horse. The plaintiff demurred, and it was adjudged for the plaintiff, because threats could not excuse the defendant and make satisfaction to the plaintiff.

In *Fletcher v. Rylands*, *supra*, Lord Cranworth said: "In considering whether the defendant is liable to the plaintiff for damages which the plaintiff may have sustained, the question in general is not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage."

In *Lambert v. Bessey*, *supra*, reported by Sir Thomas Raymond, the court says: "For where one person in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer."

In *Filliter v. Phippard*, *supra*, and in *Tubervil v. Stamp*, it was held that a person in whose house, or in whose lands a fire originated, however accidentally, which spread to

his neighbor's property and destroyed it, must make up the loss.

So in *Sutton v. Clark*, *supra*, Gibbs, C. J., says: "An individual who, for his own benefit, makes an improvement on his own lands, according to his best skill and diligence, and not foreseeing it will produce an injury to his neighbor, if he thereby unwittingly injure his neighbor, he is answerable in damages."

The old writs in trespass did not allege, nor was it necessary to show, anything savoring of culpability. Hence, upon this principle, the common law was supposed to regard the loss and damage of the suffering party, and that it would be a hardship to him, rather than to consider how the casualty occurred. And on this principle it was held and decided, by way of *dicta*, that in civil actions, infants, insane persons, and idiots, were liable for their torts the same as adults; although I have found no English case where it was necessary so to decide in meeting the case at the bar. Yet such would necessarily be the result of the above doctrine, that damage to another was the juridical cause for recovery against the person who committed the injury or caused its commission, however much it was against his will, and however accidental it was, and however free he was from negligence.

The following are the principal American cases following and resting upon the English cases: \**Bullock v. Babcock*, 3 Wend. 391; *Hartfield v. Roper*, 21 Wend. 615; *Krom v. Shoonmaker*, 3 Barb. 647; *Morse v. Crawford*, 17 Verm. 499; *Williams v. Cameron*, 26 Barb. 172; *Conklin v. Thompson*, 29 Barb. 218; *Campbell v. Stakes*, 2 Wend. 137, (claimed to be authority, but erroneously).

Shearman & Redfield in their work on Negligence, § 557, lay down the rule as follows: "Infants and persons of unsound mind are liable for injuries caused by their tortious negligence, and so far as their responsibility is concerned, they are held to the same degree of care and diligence as persons of sound mind and full age. This is necessary, because otherwise there would be no redress for injuries committed by such person, and the anomaly might be witnessed of a child having abun-

dant wealth depriving another of his property without compensation." Also see *Bush v. Pettibone*, 4 Coms. (N. Y.) 300.

In *Behrens v. McKinzie*, 23 Iowa, 343, by way of argument, Judge Dillon, referring to insane persons, remarked: "Such persons are generally held liable civilly for trespasses and torts, as the actionable qualities of such acts does not depend upon intuition."

The case of *Morse v. Crawford*, *supra*, holds that a lunatic is liable in trespass.

The case of *Krom v. Schoonmaker*, *supra*, directly holds that an insane person (a magistrate acting as such) was liable for damages actually sustained by the plaintiff, who was falsely imprisoned by him, and the circumstances were such as clearly showed that he was laboring under his malady at the time.

The case of *Bullock v. Babcock*, *supra*, was properly decided, though the reasoning of the court is faulty. A boy twelve years old shot an arrow at another and put out his eye, and the evidence tended to show that it was done wilfully. By the argument of the court the old doctrine is laid down.

In the case of *Hartfield v. Roper*, *supra*, the action was brought by a child that defendant ran over in the highway. The child was but two years old. The injury appears to have been the result of casualty on the part of the defendant, with but slight, if any negligence. But Cowen, J., held that the child could not recover by reason of contributory negligence, and applied the same doctrine of contributory negligence to this infant, as would have been applicable had it been an adult. The object was to excuse the defendant, since he was not in fault. The error was in not saying there was no negligence shown against the defendant, and in attempting to excuse the defendant for an unavoidable accident by charging the child, equally innocent, with negligence, because he did not use the same caution which an adult would have used. The other American cases cited need not be referred to in detail.

I have thus gone into quite an extended and detailed statement of the American and English cases, to show that the principle upon which they rest is, that if a man damages another he is liable for the injury to the party injured, though the in-

jury was without his fault—a doctrine utterly overruled by modern decisions. Yet the harshest and most unjust portion of it, holding lunatics and insane persons liable for torts, is retained by as respectable writers as Shearman and Redfield, and referred to approvingly by as eminent a jurist as Dillon.

Torts are of two classes, intentional or wilful injuries to the person, property, or character of another, or those injuries arising from want of care. Wilful or intentional wrong can only exist where there is a mind to act. Without mind to act, no intent can be formed. Hence in slander and libel no action will lie against a person who is insane. In *Homer v. Marshall*, 5 Munf. 466, where a judgment was rendered against the defendant, it was perpetually enjoined upon the ground that the defendant was insane at the time of the speaking of the words, and the rendition of the judgment in reference to the subject of the slander. It is held that insanity at the time of speaking the words or publishing the libel, is a complete defence. *Bryant v. Jackson*, 6 Humph. 199; *Yeates v. Reed*, 4 Blackf. 463; *Dickinson v. Barber*, 9 Mass. 225; *City of London v. Vanacker*, *Carthew*, 483; *Townshend on Slander and Libel*, 439.

Coke said a madman is only punished by his madness.

Sedgwick, in his work on Damages, in referring to the cases of *Krom v. Schoonmaker*, *Morse v. Crawford*, and *Bush v. Pettibone*, *supra*, says: "On principle this should never have been permitted. In case of the *compos mentis*, although the intent be not decisive, still the act punished is that of a party competent to foresee and guard against the consequences of his conduct; and inevitable accident has always been held an excuse. In the case of the lunatic it may be urged both that no good policy requires the interposition of the law, and that the act belongs to the class of cases which may be termed inevitable accidents. Sedgwick on Damages, 6th ed., 555, Mar. p. 455–456.

Negligence in civil actions may be defined as an inadvertent act or omission in a responsible human being, while engaged in a lawful employment, that produces as a natural result damage to another which might have been avoided by the use of ordinary care. A person who is clearly insane or an idiot, or

a child of very tender years, is not a cause of injury, but a condition. He belongs to those natural forces which, like weapons of wood, stone or iron, are incapable of moral choice, but act only as they are employed or impelled. They can not be a juridical cause, but may be used in producing the effect when controlled or made to act by another. See Wharton on Negligence, §§ 87, 88, 306, 307, 309, 310; Bartonshill Coal Co. v. Reed, 3 Macq. 266; Bartonshill Coal Co. v. McGuire, 3 Macq. 300; Grizzle v. Frost, 3 F. & F. 622; Coombs v. New Bedford Cordage Co., 102 Mass. 572; Chicago & Alton R. v. Gregory, 58 Ill. 226.

If a carrier receives, to be carried, a box containing a dangerous compound, not knowing its contents, and there is nothing to excite his suspicion, and it explodes and does damage to another, the carrier is not liable; on the ground the carrier is an unconscious agent and has been guilty of no negligence; but the sender is liable. Parrott v. Wells, 15 Wall. 524. So, if a person places a loaded gun in the hand of a child who is unconscious of its use, and the child discharges it and injures a third person, the child is not liable, but the one who gave it the gun is. Dixon v. Bell, 5 M. & S. 198. The authorities of the present day all agree in holding a man is not liable for an unavoidable accident. See for instance Bissell v. Baker, 19 Ark. 308, holding a man is not liable for shooting another, by misfortune, while hunting. So, in a very late New Hampshire case; Brown v. Collins, 53 N. H. 442, it was held where a man was driving a horse, and the horse, frightened by a locomotive, became uncontrollable and ran away with him, went on the lands of another, and injured his property, the owner of the horse, there being no want of ordinary care, was not liable for this injury.

In Railroad v. Gladmon, 15 Wall. 401, Carter, C. J., charged the jury relative to contributory negligence of a child as follows: "You have got to adopt one of two rules here; either to judge this child's conduct under the measure of his years and the measure of his discretion, or pronounce that no action lies in behalf of a child, or demand of the child a measure of judgment that nature has not given him, which would be

a greater outrage on good logic than to pronounce he had no remedy. \* \* \* The degree of accountability varies with the age and capacity of individuals, until you get to a point where he or she is utterly disqualified from protecting him or herself." The judgment for the plaintiff was affirmed.

In *Lynch v. Nuridin*, 1 *Adolphus & Ellis*, (N. S.), 29, the child was a direct trespasser, yet recovered for negligence of the owner of a cart left standing with the horse unhitched in the street. The child got into the cart and the horse ran away and injured the child. See also *Birge v. Gardiner*, 19 Conn. 507; *Daley v. Railroad Co.*, 26 Conn. 59; *Railroad Co. v. Stout*, 17 Wall. 657; *Chicago & C. R. R. Co. v. Gregory*, 58 Ill. 226; in this case the court says, "We can not impute negligence to a child of such tender years [not quite five years old], especially to one of less than ordinary mental capacity. See further, *City v. Kuby*, 8 Minn. 169; *Cahill v. Eastman*, 18 Minn. 324; *Bronson v. Southberry*, 57, Conn. 199; *Boland v. Miss. R. R.*, 36 Mo. 490; *Robinson v. Cone*, 22 Vt. 213; *Bellefontaine & I. R. R. v. Snyder*, 18 Ohio St. 399; *North Pa. R. R. Co. v. Mahony*, 31 Penn. St. 187. See *Rauch v. Lloyd*, 31 Penn. St. 358. These cases overrule the case of *Hartfield v. Roper*, *supra*, and other cases first referred to, and seem to hold with better reason that the child may recover against one who has negligently injured it, and the negligence of parents or guardians is not imputable to it where the action is by the child; otherwise where the parent sues for loss of service.

Now, under the above decisions we believe the modern doctrine is, that the child is required to exercise what capacity it has to avoid danger, which would be that capacity ordinarily exercised by children of its age. But if the child possessed less capacity, it may be shown. *Chicago & C. R. R. v. Gregory*, *supra*. But the defendant, unless he had knowledge of the mental defect, would have a right to treat it as possessing ordinary apparent capacity. *Schierhold v. N. B. & M. R. R.*, 40 Cal. 447; *Ill. Cen. R. R. Co. v. Buckner*, 28 Ill. 299. So a blind or deaf person must use ordinary care to protect himself as against his own defects. See last case cited above. The

parents may and would be liable for injuries done by the child; as if they permitted a child to enter a room with a hammer, where there was a mirror within reach likely to attract attention.

All liability for torts rests upon the basis that the party charged has done a wrongful or culpable act, either intentional wrong or the failure of himself or agent to use ordinary care. Ordinary care is measured by the intellect the actor possesses or is presumed to possess. The person who is *non compos mentis* should not be made civilly responsible for failure to exercise a power he does not possess. The great principle on which all law rests, is that it commands that which is right and forbids that which is wrong. This presupposes a *knowledge* of right and wrong. Want of knowledge and of the power to acquire it is a defence for the failure to apply it. The law does not require impossible things. Insanity is an act of God. Why should the estate of the madman be chargeable for the acts he cannot prevent? God caused his insanity as much as the tempest or earthquake. The act of God is always an excuse. The principle that he who injures another must respond in damages for the injury, is believed not to be sound where the actor is not in fault, as shown by modern authorities. The child is only responsible for the exercise of the judgment it has. Hence those who have no reason to exercise, have no liability.

TIMOTHY BROWN.

MARSHALLTOWN, IOWA.

### *X. LIMITATIONS OF JUDICIAL POWER.\**

Our readers can not have forgotten that in 1869 the Supreme Court of the United States, five judges against three, decided that the "legal tender act" of 1862 was not valid, so far as related to contracts then existing. Judge Grier having resigned his office in December of that year, and the office of an additional judge having been created, the vacancies thereby created were filled in February and March, 1870. During that year the case of *Parker v. Davis* was heard, and a decision of five judges against four, was rendered. Judge Strong who had succeeded Judge Grier of the former majority, together with Judge Bradley, newly appointed, and the former minority of the court, constituted the present majority. The opinion was given by Strong, J., wherein he says: "It will be seen, that we hold the acts of Congress constitutional as applied to contracts made either before or after their passage. In so holding, we overrule so much of what was decided in *Hepburn v. Griswold*, as ruled the acts unwarranted by the constitution, so far as they apply to contracts made before their enactment."

This naturally leads one to enquire whether there is no way of determining, *definitely*, what powers the constitution delegates to and confers upon the separate branches of the government into which it divides its functions? Is it true that a question so vital in its importance, as whether Congress possesses the power to enact a given law or not, when once decided judicially upon a full hearing of competent parties, is settled and determined only so long as the opinions of the *major* part of the supreme court, for the time being, are in unison upon this point? Is it true that Congress may have such a

\* A paper prepared by Prof. Emory Washburn, and read before the American Social Science Association, at their meeting in Detroit, May 14, 1875.



power to-day, and its exercise may be binding upon the country, but by a change in the persons or numbers constituting this court, such decision may be reversed and overruled, and the act become, *ab initio*, void, on the ground that Congress never had such a power? If it be so, it ought to be understood better than it now is, that no false estimate should be put upon that doctrine of the law, "STARE DECISIS." And the extent to which this mutability of constitutional construction reaches, should also be understood, since a decision like that of *McCulloch v. Maryland*, made in 1819, is just as open to being overruled as that of *Hepburn v. Griswold*, which was decided in 1869. If these were not *conclusively* settled, it is difficult to conceive of any means of *establishing* anything which can, by possibility, be brought within the cognizance of the judiciary, or of preventing its being, forever, an open and fluctuating question.

The objection involved in the queries above suggested, may be met by what may be assumed to be a necessary incident of the jurisdiction of every court of the last resort, a power to overrule and reverse its own decisions, when, for any cause, it shall think proper. It is not proposed to contest this power in matters of pure law, or those addressed to the discretion of the court. And if limiting and defining by construction and interpretation of the constitution, the powers of Congress upon any given subject, come within the category of pure law or judicial discretion, it might seem a waste of words to set up what is reasonable against what has become established by usage.

The question lies deeper than the propriety of exercising a conceded power. It reaches the power itself, by the still further question, Whether construing the constitution, in order to determine the powers which it confers upon the legislative branch of the government, for example, is one of those judicial decisions which, after deciding it in the mode in which judicial questions are raised and settled, is open to being overruled and reversed at any future time, however remote? To settle this question, it is necessary to go to the constitution itself, and look at it, as all deeds, contracts and legal instruments are examined, in the light of the circumstances under

why the two should be exercised in the same way, because they are delegated to the same body. And we believe that this distinction is sustained by the Federalist in No. 80, when treating of "cases arising under the constitution" as distinguished from those "arising under the laws of the United States." And Mr. Rawle, when commenting upon the powers conferred by the constitution, may be understood as referring to the same thing, when he says: "A function also appertains to the judiciary, in the exclusive right to expound the constitution and thereby test the validity of all acts of the legislature." This is what the court did in *Hepburn v. Griswold*. They expounded the constitution as to the powers granted to Congress in respect to declaring United States notes a legal tender, and decided that the act of making them such, so far as existing contracts were concerned, was invalid, because the power to do this was not one of those which had been delegated to that body. The parties interested in the question, and, through them the public, had done what the constitution had directed them to do, to put the matter at rest once and for all, and remove any doubt in respect to it—they had gone to the judiciary, and after a judicial hearing and examination, this constitutional umpire had answered their enquiry and had drawn the line, and fixed the bound beyond which Congress might not go. And the public were not a little surprised to be told that, after all this, it was not to the judiciary as a fixed and permanent functionary that the constitution intended to refer this most vital question for final adjudication, but to leave it to the varying members of it, counted by majorities, as they should, from time to time, read and understand its language. While some have considered a judgment bearing upon a question of the power of any of the co-ordinate branches of the government, as in all respects a judicial act, because performed by the judiciary, others have regarded it more in the nature of a ministerial function, in the performance of which judicial forms and rules were to be observed, but when executed, it becomes a finality like other ministerial acts. One reason why it is believed that this latter has been the more generally received opinion among intelligent and thinking

men, is, that although there have been two schools of construction of the constitution from the start, which have entered into the party politics of the country, and given rise to fierce and bitter disputes, questions involving these distinct views of the powers conferred by the constitution upon Congress have been, from time to time, settled by the courts, and acquiesced in by the adverse parties, apparently because they considered the question, when once decided, as no longer open for agitation. When an act of legislation has been declared unconstitutional, no state, we believe, has ever seriously tried to give it vitality by re-enacting it, or gone to the supreme court a second time when vacancies have been supplied in its constituent members, to try the experiment of asking to have their former judgment overruled.

One obvious ground of distinction between the ruling or judgment of the judiciary upon the delegation of a power by something as fixed and definite as the constitution was intended to be, and a question at common law, is found in the very nature of the questions to be decided. The common law, in its origin and mode of application, lacks the definiteness and stability at which the constitution aims. It is constantly growing and constantly being modified by new combinations of circumstances. And if a new rule under it seemingly conflicts, at times, with one already declared, it generally is not difficult to reconcile them by a comparison of the circumstances under which these rulings may have been made. Whereas, present circumstances can not vary what was written and intended by the framers of the constitution. That, though intended for all time, is in its language and construction, a thing of the past. It is to be interpreted in the light of its own history and can borrow little aid from the shifting politics of a later day. If the people for whom it was made desire a change in its language, or differ from their umpire, the court, in the meaning of this language, they have in the constitution itself the means of correcting these defects or mistakes, without endangering its stability by opening a new field for doubt and discussion with every change in the members constituting the court.

What of stability was there to be gained in principle over the shifting legislation of Congress according to changing majorities, by appealing to a court whose decisions were to shift with every change in the majority of its members?

If we have made ourselves understood, the question which has been incidentally raised in these remarks, relates to the future rather than the past. We make no issue as to what has been done, and have referred to existing cases chiefly to show the length to which the doctrine has actually been carried. So far as the legal tender act goes to affect contracts existing at the time of its passage, the decision of the court, either way, can make no great difference in the matter of dollars and cents. But if that and like questions are still open, as often and as long as men and parties can be found to agitate them, it augurs any thing but stability to our decisions and even to the government itself. One of the most solemn and responsible duties which every patriot owes to his country, is to preserve our supreme court from the baleful spirit of politics. We expect to see our President chosen because his opinions coincide with those of a party. We expect to see questions of party politics influencing the actions and opinions of majorities in Congress. But the constitution meant to have one branch of the government which was to move in a higher sphere and a purer atmosphere than that in which Presidents and Congress are obliged to breathe: It did not, therefore, mean to give either of these branches a chance to influence the branch which was to construe their powers, by acting upon the number or selection of those who were to constitute it, and doing this in reference to the construction which they were expected to give when these powers should be called in question. We need not assume that vacancies have been filled or new offices created with any view of thereby changing a judgment already enunciated by the court. It is enough that it may be done, and that Congress and the President, representing a party in the country, may by possibility manipulate the supreme court by indirect means like these, to give new constructions to constitutional limitations, and widen or contract the powers which that instrument has delegated to the federal government.

If ever the time shall come when the people of this country see, or think they see, judges of the highest court selected to undo what has already been done, in order to bring the construction of the constitution into harmony with the then political views of Congress and the executive, they will need something more than the moral power on which they have hitherto so confidently rested, to sustain the dignity of their high office, or give force to the judgments they may declare.

We have thus far assumed that, in matters of common law, as well as in construing statutes, the supreme court has the power of overruling its former decisions as incident to its very constitution as a court. But regarded as a court of appeal in the last resort, we have the analogy of the English House of Lords, in denying to it this power of overruling and reversing its own former judgments. When made, they are the final acts of such court. Its ultimate power of revision and decision has been exercised and exhausted. And it would be difficult to show, by any course of reasoning, why this power should be any broader or less limited in the supreme court as a court of the last resort in the United States, than in the House of Lords—the court of the last resort in England. In the case of *Attorney-General v. Dean, etc., of Windsor*,\* the Lord Chancellor says: "By the constitution of this United Kingdom, the House of Lords is the court of appeals, in the last resort, and its decisions are authoritative and conclusive declarations of the existing state of the law, and are binding upon itself when sitting judicially, as much as upon all inferior tribunals." In *Tommy v. White*,† both Lord Brougham and the Lord Chancellor hold that a judgment pronounced by the House of Lords "could not be set aside, and the case could not be reheard, without an act of Parliament passed for that purpose." The same doctrine is laid down in *Wilson v. Wilson*,‡ and *Everard v. Watson*,§ and is adopted as law by Broom.||

The very idea of having a court of last resort with a power to correct the errors and mistakes of inferior tribunals, goes

\* 8 H. L. Cases, 391.

† 3 H. L. Cases, 69.

‡ 5 H. L. Cases, 59.

§ 1 E. & B. 804.

|| Com. Law, 4th ed. 48.

far to sustain the doctrine that the ruling of such court ought to be a final and conclusive declaration of what the law is, as much as a declaratory statute would be when passed with all due formality by the legislature, and can only be changed, like other laws, by legislative action. If the question is an open one here, it is time it was put at rest.

EMORY WASHBURN.

CAMBRIDGE, MASS.

## Foreign Selections.

### I. RECENT DECISIONS ON PRIVATE INTERNATIONAL LAW.

The last two numbers of the series of these reports\* contain less of interest than some earlier numbers which we noticed last year.

(1) In bankruptcy we have (p. 246) the full report of the judgment (which we have already noticed, 18 S. J. 928) deciding that a Prussian creditor is not bound by the bankruptcy of his Hamburg debtor under which he has never proved; but, on the statement of facts now given, we are struck with the singular fact that the unsatisfied creditor was allowed to appropriate to his own use a bill forwarded to him for a specific purpose, a right which would certainly not have been conceded to him here, though on the main question the decision would have been the same. In the same sense it was held in another case from the Imperial Court at Leipsic (p. 250) that the German debtor of an English bankrupt was entitled to set off against a trustee suing in Germany a claim for breach of contract, although by English law as it then stood, the claim could not, under the circumstances, have been proved in the bankruptcy.

Under the same head, in the *Dict. de Jur. Française*, p. 239 (tit. *Faillite*), we also observe a case in which it was held that when a Frenchman is adjudicated bankrupt abroad, the representative of the estate cannot sue in that character in France without having obtained an *exequatur* from the French courts, and that, notwithstanding that the bankruptcy takes place in a country the judgments of whose tribunals are, by treaty, to be executory in France *sans revision*. This agrees with the principle which, as we observed in a former number (18 S. J. 928), seems admitted by some foreign authorities, that a man can only be adjudged bankrupt by the tribunals of his own country; but we observe, from a note appended to this decision, that the point is not a settled one in France,

\* *Journal de Droit International Privé*. Paris.

and that both earlier and later decisions have recognized the position of the representative of the foreign bankruptcy under similar circumstances.\*

(2) The jurisdiction of courts in respect of immovables situated abroad is illustrated by two cases, one from Spain (p. 253), the other from Mexico (p. 256). In the former, a contract made in Danish territory with respect to land situated in the Spanish island of Vicques, which had been established in a litigation carried through the Danish courts to the ultimate court of appeal, not, however, without the defendant's raising the plea of want of jurisdiction, was declared void by the court at Madrid, the foreign judgment being disregarded on the ground that the subject-matter of the contract was in Spanish territory—certainly a very strong application of the *lex loci rei sitæ*. In the latter case, the Mexican court, on the same ground, refused to give effect to a decree of the court at Saville in a cause of succession, directing the sale of real property situated in Mexico.†

(3) On the subject of suits against foreigners, a decision of the Court of Appeals at Brussels illustrates anew the rule of Belgian law, which like that of France, refuses to administer justice between foreigners (see 18 S. J. 625). It appears, however, from the report that it has been proposed to except from this rule the case of a foreign defendant to a suit by a native seeking to bring before the tribunal, by the *action en garantie*, another foreigner from whom he claims indemnity; and an editorial note states that this is already the rule in France, where the *action en garantie* is so far dependant on the original action as to establish a case of *connexité*. In Italy, as appears from a case at p. 336, a more liberal rule prevails in this as in other similar matters; but the courts nevertheless refuse to entertain questions of *status* between foreigners, and will not, therefore, pronounce against a foreigner an *interdictio bonorum* on the ground of imbecility, though they will make such provisional order as the necessity of the case may require, and will accordingly appoint a guardian *ad interim*.

(4) On the subject of foreign judgments, it has been held by the court at Nancy that an *exequatur* ‡ can not be obtained for a foreign judgment without citing the person against whom it is to

\* Compare 18 S. J. 928, as to the Prussian rule.

† Compare the case of Paget v. Ede, 22 W. R. 625, L. R. 18 Eq. 118, commented on 18 S. J. 967.

‡ *Dict. de Jur. Fr.* tit. Jugement Etranger.



be put in force, notwithstanding that, by the treaty, the *merite extinque* only of the judgment, not its substantial merits, is to be examined. From the expressions used in the short summary of this case, it is not clear whether the same would be held in a case when by treaty the *exequatur* was to be granted *sans revision*, but we should suppose those words also to import no more than that the substance of the foreign judgment only, as distinguished from the essentials of jurisdiction, was not to be reviewed. It will be borne in mind that, in the absence of such a treaty (for the mode of applying such a treaty see an instance at page 306), the French courts (founding themselves on the *Code de Proc.*, art. 546, and the *Code Civ.*, art. 2123, 2128; though the reasoning is far from convincing) do not, like the English courts, give effect to a foreign judgment upon being satisfied that the parties were duly before a court of competent jurisdiction, but insist on examining afresh the merits of the case, and even hold, as in the case cited, that a Frenchman can not renounce the privilege of having his case thus reheard in the tribunals of his own country. For the more liberal procedure in Italy by the *Giudizio Delibazione*, see 18 S. J. 927.

(5) As to marriage, a case is reported in the *Dict. de Jur. Fr.* (tit *Marriage*), which seems to settle a question that has been much discussed, and on which opinions have been divided. The question was whether the marriage of a Frenchman abroad with a foreigner was invalidated by the absence of the *acts respectueux*, prescribed by arts. 151-153 of the *Code Civil*, or of the *actes de l'etat civil* prescribed by art. 63. As to the first, it seems to be the received opinion, that even as between French subjects intermarrying in France, the omission of these formalities does not make the marriage invalid.\* But as to the second, which art. 170, at first sight, by expressly mentioning them, seems to require in the case of French subjects marrying abroad, there appears to have been great controversy whether their omission *per se* invalidated the marriage, or whether it only did so in cases where the parties acted in fraud of the law; a discussion which is conducted with much tedious rhetoric by Demolombe (*Marriage*, vol. 1), and summed up by him (at p. 329) in two bewildering propositions. The court at Paris appears (if we rightly understand the short summary given) to have decided in favor of the second view, and held good a marriage contracted abroad (without fraud) by a Frenchman with a foreigner, notwithstanding the omission of the *actes respectueux* and the pub-

\* Sirey, note to art. 157; Demolombe, *Marriage*, vol. 1, p. 117.

*lications préalables*, thus affirming the opinion expressed by M. Fœlix.\* It will be remembered that in our own law the omission of formalities prescribed by 4 Geo. 4, c. 76, s. 22, has been constantly held to invalidate a marriage only where both parties have known of the illegality.† We should have been glad to see this decision reported more fully.

(6) In the cognate subject of guardianship, a decision has been pronounced in the *Cour de Cassation* which seems open to some doubt. A Frenchwoman having married an Austrian, afterwards, by her husband's death regained her French nationality.‡ The children, however, remained Austrian. The question was who had the right of guardianship, the mother, who would according to French law have it, or the paternal grandfather, who would have it according to the Austrian law? The court decided in favor of the law of the mother and against the law of the father and infants, on grounds which are not very intelligible, but which seem based on "principles of sovereignty." There can be little doubt that in Austria a different conclusion would have been arrived at. Does it then depend on the law of the place where the infants are found? If so, it would be immaterial what was the nationality of the parent. But if not, it is not easy to see what "principles of sovereignty" have to do with the matter. Whatever right existed was derived out of the marriage, and it would seem reasonable to say that it must follow the law which governed the marriage relations while they subsisted, that is, the law of Austria. Suppose the question had arisen in any third country, neither France nor Austria, would not that have been the decision? And ought it to be different because it arises in France?

(7) In Hungary a question has arisen which is worthy of notice as illustrating the law of evidence in merchants' accounts which prevails in several foreign states. By the French *Code de Com.* (arts. 8-17) minute regulations are made as to the books which are to be kept by traders, and in actions between traders, books regularly kept are admissible in evidence. The *Handelsgesetzbuch* (arts. 28-40) contains similar provisions, but allows to the books less evidentiary force, requiring them to be supplemented by other circumstances, or by an oath, whether a mere oath of verification or of a more detailed kind we do not know. It appears that similar provisions exist in the Austrian code, and that by the same code a

\* *Droit Int. Prive*, vol 2, pp. 366-376.

† See 16 S. J. 769; 17 S. J. 164.

‡ *Code Civ.* art. 19.

creditor, on producing a verified extract from his trade-books regularly kept, is entitled to have inscribed on the Land-books a *Vormerkung*. This gives him a kind of charge upon his debtor's land, which, after the lapse of a prescribed period, ripens into a complete hypothecary right. This privilege, however, is only accorded to duly registered firms. In the case in question a foreign creditor sought to obtain, on the production of an extract from his books, the inscription of a *Vormerkung* against his Hungarian debtor; but, in the absence of evidence that his firm was duly registered according to the law of his domicile, the Royal Court of Appeal for Hungary, affirming the decision of the court of Pesth, rejected his demand. It may be observed that, as no register of trading firms exists here, it would seem impossible for an English creditor to use this privilege, and even if such register existed (according to the scheme of a bill introduced into the House of Commons last session), it might be a question whether, in the absence of any provisions as to book-keeping, the privilege would be allowed in countries where books are made evidence subject to strict regulations as to the manner in which they are kept.

(8) We noticed (18 S. J. 945) a decision in Holland as to the law of prescription applicable to contracts. In the present number a case is reported from Russia (at p. 333) in which it has been held that the law applicable is that of the country where the obligation is contracted. For the reasons we stated on the former occasion, we do not see how this question is capable of receiving the general answer which jurists seek to give it, and their diversity of opinion itself affords a strong reason for believing that this is true:

(9) From Switzerland we have a vague and unsatisfactory case which does not properly involve any conflict of law, or application of foreign law, and is of international interest only as it may affect the rights of foreign merchants. The result of the case seems to be that the Swiss buyer of goods from a foreign merchant, who rejects the goods delivered to him on the ground of their inferior quality or bad condition, becomes the bailee of the seller, and must neglect or delay "no measure of a nature to settle equitably the difference between them." The first part of this statement is clear, and such as would hardly be disputed; an English court would probably say that he was an *involuntary* bailee. But the end of the sentence throws on the buyer a most embarrassing burden. That he should be bound to take reasonable care of the goods is an

intelligible proposition ; but why should he be bound, or how can he be reasonably expected, to take such steps as the seller, or as a tribunal would consider fit to be taken on the seller's part, for the purpose of settling the difference between them? Amongst the measures which the tribunal thinks ought certainly to be taken, is the placing of the goods in the hands of third persons. Such a step might be most injurious to the interest whether of the seller or of the buyer ; yet, on pain of losing his right of rejection, the buyer is to be compelled to do this, to the loss of the seller if he is right, and to his own loss if he is wrong. Surely such a matter ought to be left to be determined by circumstances, and the only obligation stated as a matter of law should be that we have mentioned above, the obligation to take reasonable care?

There is also a summary of American decisions. In none of them do we find anything belonging to international law ; but several are of interest in their bearing on English law, among which we would draw attention to the cases (with the editor's annotations) under the head of *Assurance sur la vie* (as to the insurable interest), *Hypothèque* and *Immeubles par destination* (as to fixtures), *Ordre public* [No. 2] (as to a corrupt bargain to deceive the legislature), *Telegramme* (as to the effect of conditions by a company against liability for delay or miscarriage of a telegraphic message), and *Transport* [No. 2] (which seems to be a decision on carrier's liability in accordance with *Liver Alkali Company v Johnson* (L. R. 7 Ex. 267, 338).—*The Solicitor's Journal*.

## II. ON CERTAIN DISTINCTIVE CHARACTERISTICS OF ORIENTAL AND EUROPEAN JURISPRUDENCE.\*

The ancient laws of Oriental nations forming part in most cases of their religious systems, are often the most valuable, if not the only vestiges we possess of their learning and institutions. Of the commercial exploits of the Rhodians we would know but little, except for their maritime ordinance, "*De lege Rhodia de Jactus*," incorporated with the Roman laws. Hindoo, Mohammedan, and other Oriental laws are indeed known in Europe, and they are studied the more closely, since Europeans are often called to administer them in India, and their provisions frequently come under the consideration of our highest court of appeal. Yet I doubt whether their value is sufficiently appreciated; or their dictates often compared with those of European codes. The different systems are not, it is true, strictly comparable. What is there in common between the extracts of moral precepts of ancient philosophers, as the Chinese laws mostly are, and the European laws or codes, which are in all such cases the expressions of the national will? But imperfect as any comparison can be in such cases especially, comparative jurisprudence is ever invaluable for purposes of legislation and history, and I venture to say, that it may be even useful as a help to philological studies. In the codes and laws of European states an undercurrent may be traced of those principles of natural law which must of necessity govern the relations of civil society, and if we put aside such portions as belong purely to religion and such provisions as are of a purely local character, it will not be difficult, I think, to trace in Oriental jurisprudence the same principles of natural law permeating every ordinance and modifying and softening every institution.

The principal texts and authorities on Oriental law are the *Précis de Jurisprudence musulmane*, par M. Perron; the *Recueil de Lois concernant les musulmans Schiytes*, par M. A. Querry. It should be remembered that the Koran contains only the germ

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of Mussulman law. The judgments of the prophet and the decisions of the twelve Imams, his legitimate successors, forming an important corollary to the Koran. For the Hindu laws we have the Ordinances of Manu, translated by Sir Thomas Strange, together with the works of Halhead and Colebrooke. For the law of China we have the *Ta Tsing Lee Lee*, by Sir George Staunton, as well as the *Scientia Sinica* of Confucius. And for the Jewish law we have the Bible. The ancient laws of Japan are mainly founded on the laws of China.

Oriental and European Jurisprudence differ in the first instance in the sources whence they are held to emanate and in the authority they are supposed to possess. That all laws originally emanated from the Divinity is an opinion held by many philosophers of ancient times. "All laws came from God," said Plato; "no mortal man was the founder of laws."\* Heraclitus affirmed "that all human laws are nourished by one divine law." The Greek judges, said Dr. Maine, were supposed to receive from Themis, a divine agent, Themistees or awards divinely dictated. Minos, with a view of giving authority to his laws, put forth that when he retired into a cave at Crete, Jupiter, his father, dictated the laws to him. The Hindu laws, attributed to Manu, are presented as notes of a learned divine, whose spirit reflected the Divine being. The Koran is held by Mohammedans, not only of divine original, but as eternal and uncreated, the first transcript having been from everlasting by God's throne, and a copy sent down by the angel Gabriel to Mohammed. Among Mussulmans there is only one law, and that is the Religious law. With them, law is not only a legislative enactment, it is a dogma. Moses is held by Jews and Christians as having been divinely commissioned, and his legislation as proceeding direct from God. The Ten Commandments emanated direct from the Divinity and they were written by the very finger of God.

Now, in direct contrast with such claims, European jurisprudence confesses itself to be altogether human. The state being an

\* Amasis and Mneves, law-givers of the Egyptians, pretended to receive their laws from Mercury. Zoroaster, the law-giver of the Bactrians, and Zamolxis, law-giver of the Getes, from Vesta. Zathraustes, the law-giver of the Arimasri, from a good spirit or genius. Rhadamanthus and Minos, law-givers of Crete and Lycaon of Arcadia, pretended to an intercourse with Jupiter. Triptolemus, law-giver of the Athenians, affected to be inspired by Ceres. Pythagoras and Zaleucus, who made laws for the Crotoniates and Locrians, ascribed their institutions to Minerva. Lycurgus of Sparta professed to act by the direction of Apollo.—Warburton on *Divine Legislation of Moses demonstrated*. Vol. 1, p. 315.

emanation of the national will, law is the expression of the will of the people. Doubtless it may be deemed a defect of European laws that they are the work, not of Gods, but of men, and that since *humani est errare*, imperfection and instability must consequently ever be inherent to European jurisprudence. But society is ever changing, human wants are constantly revealing themselves under new phases, and jurisprudence would cease to be the science of law, if it did not take cognizance of the altered condition of society. But other consequences arise out of this contrast. A system of legislation, as the Oriental, professing to come from God, must of necessity be immutable. One confessedly the work of man, as the European, is ever changing and changeable. In the East, the observance of laws is sought for by inspiring a sentiment of awe towards their authors, and fear for the absolute monarch who executes them. In the West, the better observance of law is sought for, first, by making the people themselves their own legislators, and, secondly, by creating a united responsibility for and a common interest in the execution of the law. How far the most important systems of law may be traced back to one common human source, it is not easy to establish. We know how much British, French, German and Italian jurisprudence owe to Roman laws, and how much Roman jurists have drawn from Greek jurisprudence. And if the conjecture of Sir William Jones should be rightly founded, that Minos, the son of Jupiter, was the same person as Manu, the son of Brahma, a common source would be found to exist for both Greek and Indian jurisprudence; whilst there is much reason for supposing that the Mosaic legislation has itself drawn much from Egypt, and that Egyptian jurisprudence has in turn taken much from India.

As an immediate result of these different characteristics of Oriental and European jurisprudence, whilst Hindu laws unite and intermingle notions of cosmogony, metaphysical ideas, precepts relative to human conduct and religious duties and ceremonies, together with the laws of contract and civil laws; and Mussulman law mixes fasting, pilgrimages and the holy war, with civil rights; European laws make a sharp distinction between the sacred and the profane, between things pertaining to God and things pertaining to man. Hindu laws make the rights of the person and the rules of succession to depend on the solemnization of fixed religious or funeral ceremonies. European jurisprudence makes the one wholly independent of the other. For the same reason Oriental

laws are eminently personal laws. They affect certain races of people, or rather a given number of co-religionists. European laws affect the citizen, to whatever race, clime or religion he may belong. They are personal in so far as they govern the person in his civil condition, and real in so far as they contemplate things as the object of rights.

Oriental jurisprudence divides men into classes. Manu recognized the Brahmin or Sacerdotal class, the Kohatrya or Chuttree or the military class, the Vaisya or the mercantile class, and the Soodra or Serviles. Zoroaster divided the people into four classes—the Sacerdotal, the military, the cultivator of land, and the working population. The Japanese divided the people into eight classes; the object in all such systems being of constituting some the rulers and some the servants of society. In practice, indeed, such broad distinction will ever exist, but it is the glory of European jurisprudence to admit of no such distinction and to recognize the perfect equality of right of all men in the eye of the law. "*Ogni cittadino gode dei diritti civili*," says the new Italian code, admitting of no difference of race, religion, or caste. And that is the spirit and letter of all European codes.

As in matter of caste so in matter of sex. In India, woman is under perpetual tutelage. She is under the guardianship of her father till she marries, and subject to her husband when she does. And when her father dies, if she be unmarried, she becomes subject to the guardianship of her nearest male relations. No such subordination is recognized in European jurisprudence. By Hindu law, marriage is a sacrament, the last of the ceremonies prescribed to the three regenerate classes. By European laws, marriage is a civil contract. Polygamy is countenanced by Mussulman law, allowed by Hindu, and prohibited by European laws. In India, marriage is prohibited within the sixth degree. By the laws of China, marriage is permitted up to the fourth degree. So it is by the Hebrew laws, as well as by the European. The age of majority differs in the East and West probably from the earlier time at which puberty is acquired. According to the Hindu or Mussulman law, the attainment of puberty as a fact fixes the time of personal responsibility. European laws now generally agree in fixing twenty-one years of age as the specified limit. In Oriental jurisprudence, adoption has an important place. In European laws, the institution is not general. Adoption was known to the Roman law; and at Athens it existed also. But it was unknown to



the Teutonic nations, and it never existed in England. The Oriental laws of inheritance differ in many points widely from the European. According to the Hindu law, all legitimate sons succeed equally to both real and personal property. No right of primogeniture exists. In England, the eldest son inherits the whole of the real property, the rule being that whenever a man dies intestate leaving real estate, *e. g.*, lands and tenements, his eldest son is the only person by law entitled to the whole. In India, in default of a son, the grandson inherits, and in default of the grandson, the grandson's son. In default of the same, the widow inherits, and in default of the widow, the daughter. In England, though males are, as a rule, preferred to females, in all cases daughters succeed before any collateral relation, whilst the widow is entitled to dower. And since by Hindu law a man is considered only as a tenant for life in his own property, a will as understood by English law is wholly unknown to Hindu law, though there may be a gift in contemplation of death. The Mussulman law, however, fully recognizes a will.

When, from civil rights, we pass to matters of contract, another order of questions arises, wherein Oriental and European jurisprudence come into greater contact. It is, indeed, more in the source of law, and in the combination of religious observances with common judicial ideas, that Oriental laws stand wholly apart from European laws. But we must not criticise such combination too severely, for we must remember what Sir William Jones said, that the best extended legislative provisions would have no beneficial effect even at first, and none at all in a short course of time, unless they were congenial to the dispositions and habits, to the religious prejudices and approved immemorial usages of the people for whom they were enacted. "Les lois politiques et civiles de chaque nation," said Montesquieu, in his *Esprit des Loix*, "doivent etre tellement propre pour le quel elles sont faites que c'est un tres grand hasard si celle d'une nation peuvent convenir a une autre. Il faut qu'elles se rapportent a la nature et aux principes du gouvernement qui est etabli, ou qu'on veut etabli; soit qu'elles le forment comme font les lois politiques, soit qu'elles le maintienne comme font les lois civiles. Elles doivent etre relatives au physique du pays, au climat glace, brulant, ou tempere, a la qualite du terrain, a sa situation, a sa grandeur, au genre de vie des peuples labourers, chasseurs ou pasteurs; elles doivent se rapporter au degre de liberte que la constitution peut souffrir, a la religion des habitants, a leurs inclina-

tions, a leurs richesses, a leur nombre, a leur commerce, a leurs mœurs, a leurs manières. Enfin, elles ont des rapports entr'elles ; elles en ont avec leur origine, avec l'objet du législateur, avec l'ordre des choses sur les quelles elles sont établies. C'est dans toutes les vues qu'il faut les considérer."—*The Law Magazine and Review*.

## Book Reviews.

### I. *SEDGWICK ON STATUTES*.\*

This work belongs to a class of treatises of which we have only too few in our legal literature. While our shelves are crowded to repletion with all sorts of "practical" works, collecting the decisions upon every possible subject of litigation, and intended only to help mere "case-lawyers" in the easy construction of a brief, we can reckon almost on our fingers those which are of any service to the scientific student of law. We do not reckon among the latter class the speculations on the "science of law," with which the English press in particular has lately been teeming. These are, if possible, more utterly worthless to the real student than the "practical" books above-mentioned. In the latter, the student may, at least, find good material for his studies, however confused and unscientific the manner in which it is thrown together, and however great the amount of mere chaff with which it is mingled. But in the others he finds only vapid fancies as to what law would be, if it could be reconstructed after the plans of what Professor Amos has called, with just severity, "that morbid parasitic growth under the name of 'jurists,' which is beginning to infest the body-corporate of the English bar—and especially of the least successful portion of it." Yet while the worthless books on the one extreme seem striving to rival in number the next to worthless books on the other, we are once in a long while favored with a work in which the *true* law—the law which courts enforce and by which society is regulated—is treated, and at the same time is treated in a truly scientific method.

Both of the well known works of the late Mr. Sedgwick belong to this class; but while that on the Measure of Damages has run through many editions, and is to be found in every office, the present abler and more thoughtful work was comparatively neglected

\*A Treatise on the Rules which govern the Interpretation and Construction of Constitutional and Statutory Law. By Theodore Sedgwick. Second edition, with numerous additional notes, by J. N. Pomeroy. 1 Vol. 8vo. p. xlviii, 682. Baker, Voorhis & Co.: New York. 1874.

and suffered to remain for some time out of print. We owe all the more thanks to Professor Pomeroy, for the excellent manner in which he has edited it, and the able notes which apply its principles to questions of immediate interest. Some of these notes are models of judicious compression; and while we should have been glad to see in them more of the unity of design which animates the text, and a clearer illustration of the principles pointed out by the elder writer, it is, perhaps, ungracious to complain that he has confined himself so closely to the common acceptance of an editor's duty. Possibly the new edition will be all the more welcome to the working lawyer, for the very features of which a mere student would complain.

Although never a very popular work—as popularity in such matters is measured, by the number of copies sold—Sedgwick on Constitutional and Statutory Law, is too well known to the better order of professional minds to need description here. Covering the whole field of written law, and remarkable for the proportion and harmony of its various parts, it should be one of the first books put into a student's hands, and one of the last to leave them. The law it contains is not of the kind to be merely committed to memory to answer client's questions with. It is addressed to the understanding and judgment; and is meant rather to form the lawyer himself, than to fill him with practical law. We do not mean by this to detract from the value of the many important questions discussed in these pages. Written law is too prolific of doubts and difficulties in its very nature, not to furnish an ample harvest for the gatherer of moot points and vexed questions. But it is the peculiar merit of Mr. Sedgwick's book that these are not allowed to obscure the main threads of principle which form the matter of the work, and are nowhere more lucidly traced.

One criticism, and one only, we think may fairly be made on the book, regarded as a whole. Mr. Sedgwick had been educated in a school of legal thought which has now nearly passed away, and his whole conception of his subject bears traces of its influence. He had learned as a student that written law, "*prescribed* by the supreme power in the state," was the only true law, and that unwritten law was mere usage or custom, existing by sufferance of the legislator, to fill the unavoidable gaps in the statutes. That he had been able so far to emancipate himself from this view as to give the very fair statement of the value of unwritten law contained in his first chapter, is, in the highest degree, creditable to his native

vigor of thought. To ask that he should anticipate his generation in setting the two factors in their true relation to each other, would be unreasonable. Still it must be said that no work on interpretation and construction can ever be complete that does not do this. The written law, considered apart from the unwritten, can not be satisfactorily interpreted. It is like beginning in the middle of an algebraic problem, where we have no means of learning the value of the factors. The written law itself, in most cases, is the mere formulation of a process of construction that has gone on from the first birth of legal conceptions, and to understand it we must begin by seeking in the unwritten the force of the terms out of which it is constructed. But this subject is too extensive to be treated in a paragraph, and has indeed but a slight connection with the main purpose of this notice. The critic may wish that so excellent a book had been still more perfect, but he would be very unjust if he allowed this regret to occupy more of his attention than the very great positive merits of the work.

W. G. HAMMOND.

IOWA CITY, IOWA.

## II. OHIO STATE REPORTS, VOL. 24.\*

Volume 24 of the Ohio State Reports is before us. Some reminiscences in regard to Ohio jurisprudence are suggested to the writer which must take the place of much that could be said upon the merits of the present volume.

It will be noted that Ohio, which became a state seventy-three years ago, has but just issued the twenty-fourth volume of the new series of its reports, being the forty-fourth in all, while the newer states west of it, with much less population and litigation, are beyond the fifties. Of the comparative *quality* of these productions it might not be best to speak, but the difference in quantity is probably due to the fact that in our newer states every suitor who chooses may go to the supreme court; while in Ohio, no one, in an ordinary action, can get there unless the cause is sent up by the district court, which is itself an appellate tribunal, and beyond which few cases are carried; or unless a writ of error is allowed by the supreme court, or by some of its judges. Few cases are reported in Ohio where the principles that should govern their disposition are supposed to be well settled; while if such were eliminated from some reports we could speak of, their bulk would be greatly reduced.

One thing has always been a disgrace to Ohio. Among the wealthiest and most enlightened states in the Union, where law has been faithfully administered, where official corruption is comparatively unknown, and where able and good men and glorious women have always abounded, it has always been its policy to make the judges work for almost nothing. The writer well remembers seeing, when a boy, Judge Peter Hitchcock, for example, one of the ablest judges known in any of the states, driving, with a low-priced horse and buggy, from county to county—as, under the old constitution, an annual session of the supreme court was held by two judges in each county—coming into town from another county, as the sun was going down, spending most of the night examining records, giving a hasty hearing the next day, clearing off the docket

\* Reports of Cases Argued and Determined in the Supreme Court of Ohio (Ohio State), Vol. 24. By E. L. DeWitt, Attorney-at-law. Cincinnati: Robert Clarke & Co. 1875.

and disposing of the causes, as it seemed to the young, and, perhaps, not very learned bar, almost as if by magic, and at once, and, with hardly time to shake hands, off to another county. The young lawyers used to say, that he would take a heavy chancery record, in cases that had taken them months to work up, and, by inspecting the wrapper, learn everything inside of it. But they little knew what he was doing while they were sleeping or idling. Judge Hitchcock—I still use him for example, though he was not our only Ajax—was a large, strong man, with a huge head and with heavy hair coming down low upon his forehead, of few, and sometimes curt words, except with his pen, and his chirography was as clear as were his thoughts—was a man of immense industry and of very plain and simple manners. He lived in a purely agricultural county, where no one was rich and few or none were poor; was a rigid puritan, but without cant; and as evidence of his domestic fidelity, or, what is more probable, of that of his wife, he reared a superior family. One of his sons becoming a D.D., and worthy president of a Presbyterian college; one a leading lawyer in Northern Ohio, and, but that he preferred money, would doubtless have been called to the seat of his father; and the other, none the less honorable, became a leading farmer upon the old homestead. Judge H. had no expensive tastes, eat heartily of solid food, slept soundly when he could get time, drank nothing but water and milk—possibly a little tea, but there was no milk and water in his head; he had decided opinions upon everything; was a hater of shams and demagoguery, among which he classed Jacksonism and democracy, and could hardly conceive of the possibility of official corruption. He spent his life in building up the jurisprudence of Ohio; and those familiar with the old Ohio Reports, know something of his work, though most of it was done on the wing, and is known only by tradition. And for all this labor, traveling from one end of the state to another at his own cost, and over roads of which no one, who did not know Ohio or Indiana in early days, can conceive, he received two thousand dollars a year, and sometimes only fifteen hundred. He could live, for he had a good farm where an industrious family more than supported themselves, and his work was doubtless more congenial than to have left his rural home on the hills of Geauga, and gone to a commercial center for practice; but it was disgraceful to the citizens of a rich state to be willing to accept such service for nothing. And the old policy is still kept up. Three thousand dollars are now paid the supreme judges, and sev-

eral able and faithful men, after giving to the public the best years of their life, and for a bare living, have retired, not to rest, but, before the full decrepitude of age comes over them, although after the combative instincts have died out, and with the necessity of competing with younger and more vigorous men, men more in sympathy with the current life,—to again enter into the contests of the bar. How difficult it is to gather up the threads of business connections that have once been cast away, and how unpleasant in practice many things become that were once enjoyed, are known only to those who have had this experience. And the public also must suffer. Whether it is that men are becoming more money-loving, or see more opportunities for making money, an increasing number of Ohio lawyers, it is said, are refusing seats on the bench, and it will not be long before the policy of parsimony will tell upon the jurisprudence of the state. A farmer may purchase good seed-wheat at a low figure, but if he persistently refuses to pay a fair price, it will soon tell upon the quality of his crop.

The following excellent rule is given by the reporter, and if adopted elsewhere would lesson the danger of a misunderstanding between him and the court: "A syllabus of the points decided by the court in each case shall be stated in writing by the judge assigned to deliver the opinion of the court, which shall be confined to the points of law arising from the facts of the case that have been determined by the court. And the syllabus shall be submitted to the judges concurring therein, for revision before publication thereof; and it shall be inserted in the book of reports without alteration, unless by consent of the judges concurring therein." Under this rule the principle is given which is supposed to govern the decision, and not the conclusion from given facts. There are differences of opinion as to which is the best mode of making head-notes, although the practice of most reporters conforms to that of the Ohio court.

"C. A. C." of the *Central Law Journal*, in the number issued May 28, chides the omission of a syllabus in several cases in this volume. But those referred to are briefly reported, and either involve no principle, or the syllabus would be as long as the opinion. "C. A. C." is a critical and accurate annotator, but he would have had our sympathy more fully if he had counseled the omission altogether of most of these cases. His suggestion that the reporter should employ black-letter head-lines or catch words at the beginning of each paragraph of the syllabus, indicating its



contents, was a sound one. The head-notes and digests have always been very defective in this regard, and much unnecessary labor is thrown upon those who look for authorities in the Ohio reports.

A rule is also given requiring applications for admission to the bar to be heard by the supreme court on stated days, "when the court is in session, and at no other time." Applicants are to be publicly examined at the supreme court rooms, either by the judges or by a committee of not less than three, each one of whom must certify his opinion as to the applicant's qualification. This is better than the old practice, but the examination should be in open court by the judges, each question and answer to be reported, and the application passed upon under the eye of the bar, and upon principles applicable to all.

The enterprise of the publishers, Messrs. Clarke & Co., of Cincinnati, cannot be too highly praised. They publish a volume of 680 pages, besides table of cases and index, of larger size than those of the Missouri reports, of better paper and better binding, for two dollars and fifty cents retail. And they have republished all the old volumes at the same price. The enterprise, doubtless, pays, for the price usually charged for reports is simply exorbitant. The publishers would do well, doubtless, for themselves, certainly for the public, if they could republish the Kentucky and Indiana reports at the same price, and we speak of them specially because of the contiguity of those states with Cincinnati.

Several of the causes reported are suggestive. In *Upington v. Oviatt*, p. 232, although the questions involved are local in their application, yet the subject is of general interest. It is one of the numerous cases where property holders in a town have attempted, though usually without success, to protect their property from seizure and sale for pretended improvements. The fact is developed that in Ohio the state has done something to protect such property, by enacting that in no case shall the tax or assessment specially levied upon any lot of land for an improvement exceed twenty-five per cent. of its taxable value, the charge exceeding that amount to be paid out of the general revenue. Cases have occurred in Western cities where a local assessment upon city lots, for a public improvement, and made upon the ground that the lots were thereby specially benefited and increased in value, have been heavy enough to cover more than the full value of the lots, and when they have been sold to meet it,

an attempt has been made to collect the balance out of the other property of the owner. Such attempts, it is true, have not met with much encouragement in courts, yet courts have not been able to prevent town property from being wholly swept away by special assessments for local improvements, made upon the ground only that the property was greatly benefited, and therefore its owner enriched by such improvement. A statute like the one referred to, would, in a certain measure, protect one from being *thus* enriched by ignorant or reckless town councils.

Harrison v. Hoyle, p. 254, is a very long case, and, amid the sea of uncertainty in regard to the proper owners of the property when church organizations part asunder, it was examined with interest for some light upon the questions supposed to be involved. That most excellent of religious bodies, the Society of Friends, divided upon a question which is not given; or, rather, a schism originating in another yearly meeting extended to Ohio. The dispute was over certain school property, as to which party should succeed to its ownership, and the court divided upon a denominational fact, upon which there should have been no doubt. Each organization called itself the Ohio Yearly Meeting, one of which, the plaintiff's beneficiary, being recognized by most of the other Yearly Meetings in the country, and the other by only a few. The majority of the court seem to recognize that as the true Yearly Meeting which was so treated by other corresponding bodies, while the minority consider each Yearly Meeting as ecclesiastically independent of all others, holding only mutual correspondence and sympathetic communion, after the manner of local churches in other denominations that have no common head. If the former view be correct, the plaintiffs should succeed; if the latter, they should fail; for, as shown by Judge Welch, in a minority opinion, in point of regularity, the defendants were the true successors of the old Yearly Meeting.

P. BLISS.

SAINT LOUIS, Mo.

### III. HERMAN ON EXECUTIONS.\*

Worcester defines a "treatise" as "an elaborate composition or discourse on some subject; a formal essay," and says "it is more systematic and extended than an essay." Webster's definition is: "A written composition on a particular subject, in which the principles of it are discussed or explained." He who takes up Mr. Herman's work expecting to find it a "treatise," in the sense of the lexicographers, will be disappointed. The author has disowned all pretensions to a "treatise" in his preface, saying of himself: "He has laid down no principle, advanced no theory, unsupported by authority. While his opinions are not always in harmony with the principles enunciated, he has studiously refrained from giving them." Accordingly we find that the only "treatise" in the work is contained in portions of the two opening chapters, on the origin, nature, forms and contents of the writ of execution, except an occasional page or two upon incidental subjects, as upon final process in the United States courts, and as to the rolling-stock of a railroad company. Twenty-six pages are occupied with a useful compilation of the exemption and homestead laws of the different states. Nearly the entire work consists of a digest of decisions upon the subject of executions, arranged in the usual form of a law treatise, and with copious citations of authorities in connection with nearly every sentence or paragraph. In this way about 9,000 cases are cited; sufficient, it would seem, to make the work "exhaustive," so far as their number is concerned.

If it is becoming fashionable to thus confound digests with treatises, we beg to protest against the tendency. We feel assured that we represent the bar of the country, whose bookshelves are becoming over-crowded with elementary treatises, in urging book-makers and book-publishers to preserve strict classifications, and to give us our digests in the most compact and best approved style of our leading digesters.

\*Treatise on the Law of Executions. By Henry M. Herman, counsellor at law. New York: James Cockcroft & Company. 1875.

Presuming that the practitioner will find every case on the subject cited by Mr. Herman, we fear he has glanced over them too lightly, and hastened the publication of his book too rapidly, to have placed the profession under the greatest obligations to him. Perhaps no subject in the American practice could be more particularly affected or more thoroughly diversified by state legislation. But in several instances this legislation receives slight attention. Under the head of the issue of execution, at pages 57 and 58, the references to the time after judgment when, and the limit within which the writ may issue, are not complete. "Stay of execution in justice's courts," is so purely statutory that no decision should be printed without the statute in full accompanying it; but the author, at page 597, thinks it "can not be expected that the statutory grounds in each state and territory can be given." Accordingly he prints none of them, not even those of the state from which nearly all his citations under that head are made. At page 599, treating of a *remittitur* (which Mr. H. prints "*remittur*") from the supreme to the inferior court, in order that execution may issue, the case of *Dibrell v. Eastland*, 3 Yerger, 507, is cited as authority to the effect that the judge of the inferior court can not order or stay such execution. But in Tennessee, no such practice prevails, the supreme court having power to execute its own final judgments. The case cited merely decides that a judge of the inferior tribunal can not by supersedeas stay the process of the supreme court; and Mr. Herman, at p. 604, so cites the case (though he there styles the defendant *Eastman*). At page 179, in § 132, which is "in regard to the principles relating to real property or land that is subject to execution," occur these several and distinct sentences without more: "The real estate of a *femme couverte*, in satisfaction of her debts contracted before marriage" (citing *Fox v. Hatch*, 14 Vt. 320.) "Property in any county of the state in which judgment is rendered" (citing *Brush v. Lee*, 36 N. Y. 49). If we, by faith, take these curt phrases to imply that such property is subject to execution, shall we infer that this is so in virtue of any general "principles" relating to final process, when we know that these subjects are almost always regulated by state statutes?

Another evidence of haste may be found in the fact (only important as such an evidence) that §§ 302 to 326, both inclusive, do not appear in the work at all.

We note these proofs of hasty and careless book-making in discharge of our duty to that profession to whose generosity Mr.

Herman appeals in his preface, but whose over-crowded libraries impel them to ask justice before generosity is demanded. The 640 pages of Mr. Herman's text are put up into a book which occupies fully one-fourth more space than the 790 pages of 3 Bennett's Fire Ins. Cases, or the 816 pages of Bump on Bankruptcy, 7th ed., and almost one-fourth more than the 790 pages of Benjamin on Sales, 1st Am. ed. This the publishers have accomplished by the employment of a very heavy paper of but medium quality.

The letter-press is commendably good ; the mechanical execution of the table of cases and of the index being particularly pleasing to the eye. The latter contains a novelty in the use of words, "what," "when," "where," "who" and "why" as catch words, whose use is evident.

JAMES O. PIERCE.

MEMPHIS, TENN.

#### IV. WATERMAN ON TRESPASS.\*

The first volume of this work is divided into three books. 1. Trespass in general; 2, Trespass to the person; and 3, Trespass to personal property. Book 4th, concerning Trespass on Real Estate, constitutes vol. 2. Each volume is complete in itself, containing a table of contents, a table of cases and a full index. This will be found a great convenience.

Book first, of trespass in general, contains two chapters, the first defining and giving the nature of trespass, and the second pertaining to the action of trespass as a remedy, and treating in general of the law of liability with the pleadings and evidence. Of book second, chapter first is concerning assault and battery, and chapter second, concerning false imprisonment, while book third of trespass to personal property is divided into five chapters, the first pertaining to title to personal property, the second to its wrongful taking by a private person, the third to its wrongful taking by an officer, the fourth enquiring who may maintain the action, and the fifth considering the remedy.

Vol. 2 pertains to trespass on real estate and contains nine chapters. 1. The right to enjoyment, both in land and of easements of all kinds. 2. Justifiable entry, whether excusable or by license, or by warrant. 3. What constitutes an invasion, whether of a home, of a water-course, or an easement. 4. Trespass concerning animals, in which is considered the law of distress, *damage-feasant*, and of dog-killing. 5. Parties entitled to redress. 6. Remedy for trespass, including pleadings, evidence, damages, effect of judgment, etc. 7. Action of trespass to try title. 8. Same for mesne profits; and, 9. Proceedings in forcible entry and detainer.

This brief statement will show the ground covered by the work, and to the lawyer will indicate the multitude of questions that are necessarily discussed. Text-books are increasing so rapidly as to make it important to scrutinize every new demand upon public favor, so as to make it unprofitable for publishers to impose upon

\*A Treatise on the Law of Trespass, in the two-fold aspect of the law and remedy. By Thomas W. Waterman, counsellor at law. In two volumes. Baker, Voorhis & Co: New York. 1875.

the public those that are thrown together in haste, or are substantial copies of other works, or such as are written by those who are incapable of appreciating the breadth and depth of the subject they attempt to discuss. The work before us is evidently prepared with care, and places in a form convenient for reference, the law bearing upon this ancient branch of jurisprudence. It is not strictly a commentary. The author does not attempt to philosophize or speculate, but seems rather to be anxious to embody in his work the law as declared by the courts; his references to authorities are constant, and, upon some topics, we notice more citations of the decisions of western courts, than is usual in eastern books. It would seem that every matter that could arise under the head of trespass, would have been settled for centuries, if it is possible to settle anything; but still the books abound in cases involving their consideration anew, and the young lawyer will be glad to see before him the old doctrines as substantially reiterated in every court in the land.

In the remedial portion of volume first, that is, in distinguishing the action of trespass from trover and case, it might have been well to make more prominent the changes in pleading made by what is called the New York Code. The fundamental principles of pleading can not be changed so long as one party states his cause of action, and the other his defence, but some of the distinctions between different forms of actions for injuries are ignored by the code. Trespass, as being a wrong done with force, will always remain trespass, its character clearly defines and distinguishes the injury from all others, and it will always be known as the name of an action for the recovery of damages suffered from the commission of a wrong with immediate force, and notwithstanding the abolition of the names and forms of actions. As the name of the thing itself, and not of the form of a declaration, it will never be confounded with trover or case, although at common law, the distinction was sometimes but one of form. Thus, trover, with the allegation of loss and finding, would lie for trespass *de bonis*. There was really a trespass, but the remedy was not only by the action of trespass, but by that of trover as well. But when, as under the code, these, and other terms are used as means of classification merely, and to indicate distinctions in fact, and not in form, we can never apply the term trover, or call an action one of trover, when the wrong was a trespass. Hence, we now say, one sues in trover for the conversion of property, when its possession was obtained rightfully and with-

out force, and the action is trover because of such possession, as distinguished from possession by a trespass, and not because the plaintiff's pleading alleges that he lost the goods, and the defendant found and converted them.

It is not meant that the author ignores code pleading; on the contrary, he sometimes refers to it, and to points of departure from that at common law, but to those who practice under the code, a fuller recognition might be useful. Still it may be said, and with great force, that if one understands well the common law system, he can not fail under the code. This is true as to the theory of pleading, and had that theory been adhered to in practice, the great changes made, both in this country and in England, would not have been called for. And it may also, and with truth, be said that in the action of trespass, which is alone considered by our author, the fundamental principles of pleading, had not been ignored, as they were in most other actions. It was necessary that defences of new matter be set out on paper, and the plaintiff was in no danger of being surprised upon the trial by a justification of which he had had no notice. Thus the distinction between the common law and code action, when its cause was founded upon a trespass, is much less than when founded upon contract. And this may be a sufficient reason why even a New York author should be content with but few allusions to the new system.

We looked through chapter 4, vol. 2, of trespass concerning animals, to see if the author had noticed the changes in many of the states in regard to the duty of fencing in one's cattle. The common law is clearly stated, also the law pertaining to partition fences, both as between farms and lots, and as between both and railroads. But a little fuller consideration of the law, as held in those states that regulate fencing by statute, and that permit cattle to run at large, would have been well. The subject is not overlooked, and the general doctrine is stated (§ 878 and notes), but it assumes a greater importance in the west than it can in the old states north of Pennsylvania, where the common law prevails, as we hope it will ere long with us.

In chapter first, the author considers the right of the riparian owner to the use of flowing water. The common law doctrine is given, as well as its application by some of our older courts. This right, however, has been greatly modified, and sometimes taken away altogether in several of the states. For instance, for the purpose of encouraging the building of flouring mills in a new country,



a right to appropriate the whole stream has in some states been given to the owner of one bank only, and in the mining states and territories, the first comer may appropriate as much as he chooses of a water course, either to irrigation or to placer washings, without any reference to the common law rights of riparian owners below. The law upon that subject is somewhat chaotic as yet, but the rule "first come, first served" seems to be applied. When visiting the mountains last year, some excellent lawyers expressed to us the belief that legislation and the decisions would soon present a harmonious system, and one adapted to the new conditions of those countries. It is possible that the laws of Mexico will be consulted before such a result will be had.

One or two other omissions might be noticed, but there is so much more to please than to criticise, that further allusion to them might seem hypercritical. The book will be welcome to our already rich collections upon special titles. It is, however, hoped that from the success of a few books, too many persons will not feel themselves competent to make a law book. A good one can only be the fruit of years of special hard work, to say nothing of the years of previous discipline.

P. BLISS.

SAINT LOUIS, MO.

*V. WHARTON ON HOMICIDE, SECOND EDITION.\**

It has now been twenty years since Dr. Wharton published the first edition of this work. Although it was well received by the profession, he purposely suffered it to remain out of print for several years, because the same subject was discussed in his work on Criminal Law. In giving his reasons for publishing a second edition, he points out seven important changes which, he states, have taken place in the juridical sentiment on the law of Homicide since his first edition was prepared. We have examined the text of those portions of his work wherein he discusses these changes, and we have concluded that the subject is of such importance as to demand a more extended notice at our hands than we can give it in this number. We shall therefore hold it over, with the intention of noticing it at considerable length in our next issue.

In the meantime we can cordially recommend it to our readers. It has been so thoroughly revised and so greatly enlarged that it would be difficult to identify the original materials. The cases on the important branches of the law of Homicide are very fully collected and stated down to date, including several published only in the law journals. But it is not a mere digest or collection of cases. In this respect it is a great improvement on the first edition. It abounds in thoughtful and philosophical discussions, some of them, perhaps, too speculative, and otherwise open to criticism, but none of them dull or profitless.

It is printed by the Riverside Press, and, with the exception, perhaps, of the verification of citations in the foot-notes, a neglect which is not chargeable to the printer, possesses, in respect of its mechanical execution, all the elements of a first-class American law book.

\* *A Treatise on the Law of Homicide in the United States; to which is appended a Series of Leading Cases.* By Francis Wharton, LL.D. Second edition. Philadelphia: Kay & Brother. 1875. Price \$6.50. Sold by Soule, Thomas & Wentworth, St. Louis.

## VI. THE TRIAL OF JAMES M. LOWELL.\*

The defendant, James M. Lowell, and his wife, the deceased, lived unhappily together, although young. He had offered her violence on several occasions, and finally she had been forced to leave him and take up her residence at a neighbor's. On the 12th of June, 1870, Lowell called at this neighbor's with a team and took his wife away. She was never again seen alive, but the rumor became current that she had run away with a circus. More than two years after, the *headless skeleton* of a woman was found in the woods near the road along which the defendant and his wife had driven on that night. These remains were identified as those of Mrs. Lowell. The head was never found. Upon evidence entirely circumstantial, the prisoner was convicted of murder in the first degree and sentenced to be hanged.

The trial was conducted before Hon. Charles W. Walton, the state being represented by Hon. Harris M. Plaisted, Attorney-General, and George C. Wing, Esq., County Attorney; while Hon. Eben F. Pillsbury and Hon. Mandeville T. Ludden represented the prisoner. The case was conducted with ability by the counsel on both sides, and with ability and impartiality by the court. Under the law of Maine a certified copy of the record was transmitted to the governor and council. They are required carefully to review the whole case, and unless they think proper to pardon the convict or commute the sentence, the governor is required, upon the expiration of one year after the sentence, to issue his warrant of execution. This time expired on the sixth day of May. We have not learned what the result has been. The case is one of great interest, and this book should not be overlooked by those who are collecting accounts of trials.

\* Report of the Trial of James M. Lowell, indicted for the murder of his wife, Mary Elizabeth Lowell, before the Supreme Judicial Court of Maine. By H. M. PLAISTED, Attorney-General. Portland, Me.: Dresser, McClellan & Co. 1875.

### *VII. SEPARATE USE IN PENNSYLVANIA.\**

In this address Mr. Mitchell, following the example of others who had delivered addresses before the academy on previous occasions, has chosen a technical subject, and has exhibited in outline the limitation of property to the separate use of a married woman, as it exists in Pennsylvania, tracing it from the earliest doctrine of the English Court of Chancery, through statutes and decisions down to the present time. It is printed in superb style.

\* Separate use in Pennsylvania, considered in Respect to the Restraint on Alienation. An address delivered before the Law Academy of Pennsylvania. By E. Coppee Mitchell. Printed by the Law Academy Philadelphia: T. & J. W. Johnson & Co. 1875. pp. 45.

### *VIII. THE QUESTION OF INTEREST DURING THE WAR.\**

This pamphlet of thirty-five pages consists of the elaborate arguments of counsel in the case of Harmanson, assignee of the Portsmouth Savings Fund Society, v. Samuel M. Wilson and others, in the Circuit Court of the United States, at Norfolk, Virginia, and also the opinion of Mr. District Judge Hughes, sustaining the act of the Virginia legislature abating interest which accrued during the late war; together with an opinion of Mr. United States District Judge Giles in the case of the Jackson Insurance Company v. Stewart, concerning the suspension of interest and the statutes of limitation, during the war.

\* Richmond, Va.: West, Johnson & Co. Price 30 cents.

## Notes.

**COMPROMISE VERDICTS.**—A Scottish journal has given, "on the most trustworthy authority," an account of the system adopted by the jury in fixing the amount of damages in the recent action against the Athenæum. It appears that one juror from the first declined to agree to more than nominal damages, but each of the other eleven wrote down what he considered a fair award; these separate sums were added up; the sum total was then divided by eleven, and the product of this division was taken as the damages to be assessed, having first been docked of a small sum to conceal the process of computation. It is not quite obvious why the sum total should have been divided by eleven instead of twelve, and the dissentient jurymen might fairly complain that while one of his fellows who jotted down only a farthing was allowed to count in the division, he was shut out, and the verdict was given for over £100 more than would otherwise have been the amount. Assessing damages by taking an average is not, we believe, an unusual practice—it seems to have been adopted by a jury at the Liverpool Assizes on Tuesday last—though it is probably less common than that of adopting a middle sum between the highest and the lowest sums proposed by jurors. Like that plan it may, and in most cases must, bring about the result that the verdict does not represent the amount which any single jurymen, acting in the fulfilment of his oath, believes to be that which ought rightfully to be awarded to the plaintiff. As Mr. Baron Pollock said at Liverpool, the verdict ought to be the result of twelve minds after consultation. There might be one man in the jury box who might put forward views which might very much influence his brother jurymen, and the result might be very different if the matter was talked over instead of figures being put down. As regards this, however, we may remark that where all the jury are agreed to give substantial damages, the adoption of some expedient of this kind is not likely very materially to vary the result which would be reached by the mutual concessions resulting from prolonged discussion. The principle of the verdict is unaffected. But in the Edinburg case some of the jurymen (two at least), seem to have been in favor of mere nominal damages, and thus the result of the mode adopted was to leave to an unknown chance the determination of a matter, viz., whether the damages should be substantial or nominal—which was almost, if not quite, as important to the parties as the question for which side the verdict should be.

We have not met with any authority expressly in point as to the effect

upon a verdict of recourse being had to the expedient of taking an average under such circumstances as those disclosed with reference to the Edinburg case. There are, of course, cases of compromises by a jury leading to verdicts clearly inadequate, such as the very recent case of *Falvey v. Stanford* (23 W. R. 162), and the earlier reports are full of cases of the adoption by jurors of modes of decision which saved them the trouble of arriving at an agreement by full and fair discussion. In one of the earliest of these, in the reign of Charles II. (*Prior v. Powers*, 1 Keb. 811), a Bedfordshire jury, being equally divided in opinion, agreed to put two sixpences into a hat and give their verdict for plaintiff or defendant according as one or other sixpence was taken out by the person selected to draw. Upon an application to set aside the verdict, Windham, J., was of opinion that "this is as good a way of decision as by the strongest body; which is the usual way." Twisden, J., however, "doubted it would be of ill example," but as the circumstances under which the verdict was given "appeared only by pumping a jurymen who confessed all," the court refused the application for a new trial. In subsequent cases the opinion of Twisden, J., was adopted, and verdicts arrived at by similarly irregular means were set aside, even though the verdicts chanced to be right. Thus in *Hale v. Cove*, 1 Str. 642, where a jury, after sitting up all night, agreed to put two papers in a hat marked P. and D., and to decide for plaintiff and defendant according as the P. or D. paper was drawn, it happened that the verdict thus given was in accordance with the evidence and the opinion of the judge, but nevertheless, on a motion for a new trial, it was set aside. In *Parr v. Seames* (Barnes, 438), where the jurors agreed to determine their verdict by the circumstances of whether the major part of halfpence "hustled in a hat" came up heads or the reverse, the court seems to have admitted the affidavit of a jurymen to show what happened in the jury-room. But it has long been settled, in accordance with the early case above cited, that the testimony of the jury themselves can not be received (see *Vaise v. Delaval*, 1 T. R. 11; *Straker v. Graham*, 7 Dow. P. C. 223), so that provided a jury take the precaution to ascertain that the walls of their room are thick and that there are no listeners outside the door, they may be tolerably safe that their verdict, arrived at by chance, will not be upset. According to Lord Mansfield, however (1 T. R. 11), jurors who adopt these means of coming to a decision commit "a very high misdemeanor," and in the reign of Charles II. jurors who had cast lots for a verdict were fined. *Foster v. Hawden*, 2 Lev. 139. In the same reign a Northumberland jury, who had agreed to determine the matter at issue by the fall of a sixpence, were ordered to attend the court the next term. *Fry v. Hardy*, T. Jones, 83. An Irish jury, mentioned by Mr. Baron Deasy, in his evidence before the committee on the jury system in Ireland, last session, took the precaution of attempting to obtain judicial sanction for an irregular mode of obtaining a verdict. "The jury came

out, and the foreman said, 'My lord, we wish you to decide this case yourself.' I said, 'I can not give a decision for you.' They again returned, and in about an hour came out, and one of them said, 'My lord, will you let us have a vote for it?' \* \* \* I had to discharge them."  
— *The Solicitor's Journal*.

CITATIONS IN PENNSYLVANIA CASES.—The Albany Law Journal recently called attention to the fact that "the Pennsylvania judges seldom cite cases decided in other states." A correspondent stated that this was because of a statute preventing such citations. Thereupon another correspondent asserted that the legislature of that state never passed any such statute; that the only one that may be called analogous to it, was the one approved March 9, 1810 (5 Smith's Laws, 125), which prohibited the reading or quoting of any *British* precedent given or made subsequent to the 4th of July, 1776, but this was wisely repealed by the act of March 29, 1836. Pamphlet Laws, p. 224.

Still, the correspondent goes on to say, I believe that decisions of other states are not as frequently cited in Pennsylvania as they are in other state courts, especially in western courts. This is not so strange when we remember that the reported adjudications of Pennsylvania judges commence at an earlier period than any other state, except Harris and McHenry's Report of Maryland, and Jefferson's of Virginia; and when those reports now number 138 volumes, containing adjudications by such men as Tilghman, Gibson, Woodward, Strong, Sharswood, and others, upon many of the questions that daily arise in our courts, and therefore the judges have often merely to determine the effect of those prior adjudications.

But if the question is a new one, the adjudications upon the subject from "all the courts in Christendom" are presented, where the parties are fortunate enough to be represented by industrious counsel, or are hunted up by the judges themselves. Such is the case of *Jones v. Wagner*, 66 Penn. St. Rep. (16 P. F. Smith) 429, where our supreme court first determined the right the service owner had to support from the owner of the coal beneath—Thompson, C. J., saying: "We have no case strictly of authority in our books (*i. e.* reports), nor do I find any in the books of our sister states," and then, after citing the latest English cases, follows their decisions. Where a great constitutional question is argued, as the local option case, *Locke's Appeal*, 72 Penn. St. Rep. (22 P. F. Smith) 491, the adjudications of our sister states, such as Delaware, New Jersey, Vermont, Iowa, and Texas, were carefully presented to the court in the paper book of the able counsel for the defendant, and the acts of assembly of these various states were also given *in extenso*. True it is that the court did not cite any of these in its written opinion, but the report should, and perhaps does, show that they were referred to in the argument.

Again, says the correspondent, if an important corporation case is decided, which often involves new points, decisions of other states are freely cited; for an instance, see *Dietrich v. Penn. R. R.*, 71 Penn. St. Rep. (21 P. F. Smith) 432, where it was held that a drover had no right to stop off on a drover's through ticket. Further it must be remembered that as equity is administered in Pennsylvania through common-law forms, we have a "law unto ourselves," and decisions of other states often would not aid us in its proper construction. But, nevertheless, the court is always glad to have the opinions of judges of the other states, and where there are such adjudications directly in point, and where the parties are represented by industrious counsel, such opinions are cited to the court; perhaps they may not be referred to in the written opinion of the court itself, but the report of the arguments of counsel will show, to the careful reader, that they were called to the attention of the court.

**THE ROMAN LAW AND THE GRANGERS.**—An ingenious correspondent of the Nation, signing the initials "F. W.," says that the invalidity of Granger legislation may be shown by reasons which lie back of the constitution of the United States. The provision in that constitution, that no state shall pass any law impairing the obligation of contracts, introduces no new sanction, being simply a formalization of a cardinal maxim of jurisprudence, viz., that no statute is to be construed to retrospectively affect vested rights. I give on this point, says he, a condensation of Savigny's exposition, contained in the eighth volume of his great treatise on Roman law (*System des heutigen Römischen Rechts*, Berlin, 1848, Bd. viii. § 392):

The law which is to be applied to contracts, is that which existed at the time when the contract was entered into. This rule is applicable to the capacity of the parties; to the form of the contract; to the condition of its validity; to the manner and degree in which it is to operate. And by the law thus existing at the time of the execution of the contract, are we to determine all questions as to its validity or effect, however these questions may arise?

The parties to a contract have a right to insist on this rule, irrespective of the interference of any subsequent legislation. This is a vested right, which the legislature can not impair. . . . Even a positive prohibitory law can not be construed as preventing the enjoyment of such right.

He gives two illustrations which bear on Granger legislation:

A person who by the existing law has reached majority, makes a contract. By a subsequent statute this person is declared to be a minor. This does not affect the validity of the contract made under the prior law.

A person under the old Roman law is made infamous by a statute of attainder, under which he is held deprived of business capacity. Yet, notwithstanding this statute, contracts he made before its passage continue to operate, and his estate to be bound by them; and his business capacity as to such contracts continues.

Under the old Roman law, women could execute contracts of suretyship (*Burgschaft*). By the *Sc. Vellejanum*, their capacity in this respect was restricted. The



restriction operated on contracts made subsequent to the statute, prior contracts continued to operate continuously, notwithstanding the statute.

The correspondent then applies these positions to Granger legislation, as follows :

A statute is passed giving a corporation unlimited power to take tolls and to borrow money, the interest of which these tolls are to pay. Money is borrowed in pursuance of this power, the contract being that the tolls are to pay the interest. No subsequent statute restricting the power of the railroad in respect to tolls, can affect either its right or its duty to levy such tolls as would best enable it to fulfil its contract. If, to follow the analogies of the Roman law, a bill should be brought against the corporation by the bondholders to compel it to impose adequate tolls, it would be no defence that the legislature had forbidden the tolls to be levied. The statute to this effect, no matter how potent it might be as to the future, could not be construed to affect engagements validly made in the past. And Savigny argues that this rule is one of those fundamental maxims which courts can not disregard. If a legislature can invalidate a contract, valid under a prior law, the foundation of society will be destroyed, for in this way faith would be lost not only in the validity of *contracts*, but in the validity of *laws*.

AN ANCIENT LAWSUIT.—The Saint Louis Republican contains an interesting account of a very aged lawsuit in Kentucky. "It was begun, says the Republican, in 1815 by Joseph Blackwell, for the recovery of, and title to 19,000 acres of land, bounded in part by the waters of Licking river and Slate creek. It was commenced in the Bath county courts and afterwards changed to the Clarke county courts, and has been tossed from one county to the other ever since. The plaintiff claimed title to the tract of land, by virtue of an entry made under a treasury warrant in July, 1784, and a subsequent survey on that entry, for which a patent was issued sometime afterwards. The land was squatted on and occupied, and claimed by various people. Blackwell asserted that these defendants and possessors, held the land under different entries and surveys and patents, issued thereon, all of which were older in date than the survey and patent under which he claimed the title, but which he insisted were void for want of certainty, and otherwise contrary to 'law and location.' There were ninety-nine defendants to the original suit. The cause dragged, and did not reach a hearing until 1831. The process first resulted in favor of the plaintiff, and in the two succeeding years, judgments were rendered him for the recovery of all the land sued for, and in possession of the parties then before the court. An appeal was taken from the judgments, and in 1835, the defendants obtained a reversal, not on merits, but on purely technical grounds, and the cause was remanded to the Bath county courts, where it dragged till 1846, when a change of venue was taken to Clarke county. Since that the lawyers and the courts have been playing shuttlecock and battledore with it, and in the meantime, all the original parties to the suit have gone to their long homes, and the original lawyers bequeathed their interests in the suit to their heirs and successors. Other complications have arisen,

and every year the interests of the suit are becoming more numerous and persistent. It is a good thing for the lawyers, while the value of the property increases faster than it is eaten up by costs, but they will finally divide the property out amongst them, and the heirs and claimants, having become food for the hungry attorneys, will not have lived in vain. Of late years the principal object of the hearings in the case, have been to review the old processes, and examine the grounds thoroughly. The litigation shows no signs of dying out, and it is no nearer a settlement than it was sixty years ago. The litigants and their lawyers have no thought of giving up the contest now. The steps taken during the last few years, evince a determination among all the parties in interest to bring the case to a final issue on its merits. They mean to fight it out on that line if it takes all the century. The lawyers will see, however, that the end does not come too soon, and it is altogether likely that when the rightful heirs come to their rights, the 19,000 acres of land will have dwindled to a patch not large enough to produce a full sized peanut. So the world goes—out of one man's hand into another, and probably those live best who contrive to live without law."

Ten to one the lawyers engaged in this litigation are the worst sufferers by it. We doubt if it would be more than common justice in the Kentucky legislature to pass an act pensioning such of them as have seen fifty years' service in this suit. After a lawyer has for half a century "worn his strength away in wrestling with the air," he has become a proper object of public charity. At least it should seem that the parties litigant ought to be able so far to compose their difficulties as to establish a common fund for the relief of their superannuated counsel.

**POWER OF JUDGES TO COMMIT FOR CONTEMPT.**—The necessity for defining by legislation the power of judges to commit for contempt of court seems to be recognized in most systems of law. In the United States the judiciary act of 1789 (s. 17), declared that the courts shall have power to punish contempts of their authority in any cause or hearing before them by fine or imprisonment at their discretion. But the dangerous latitude of this power was curbed by an act of Congress passed in 1831 (4 Stat. at Large, 487), entitled "An act declaratory of the law concerning contempts of court," and which limited the power of the several courts of the United States to inflict summary punishments for contempts of court to three classes of cases: (1) Misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; (2) misbehavior of any officer of the courts in his official transactions; and (3) disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the court. In a very recent case before the supreme court (1 Cent. L. Jour. 280.; 13 Am. L. R. 435),

it seems to have been contended that, since the statute of 1831 did not prescribe the penalty which the courts might inflict for contempt, it was competent for them to punish by disbarring a practitioner who had used disrespectful language. But the supreme court, remarking that "the law happily prescribes the punishment which the court can impose for contempts," held that section 17 of the judiciary act must be construed as impliedly prohibiting all modes of punishment other than those mentioned in it. It will be observed that under the statute of 1831 the power to punish as contempts, publications made, or acts done, out of court, is of the most limited description.

Turning next to France, we find that article 222 of the *code penal* renders punishable by imprisonment, for not less than one month or more than two years, words tending to impeach the honor or integrity of magistrates. If the words are uttered in court, the penalty is imprisonment for not less than two or more than five years. And (art. 223) gestures or threats made use of with respect to a magistrate while in the exercise of his duties, subject the offender to a penalty of six months' imprisonment, or, if the offence is committed in court, to a heavier term. The offence thus created is on the same footing with other crimes, and the offender is sent to be tried in the ordinary way. The provision on this subject of the Italian code closely follows the *code penal*. "When a public official, either of the judicial or administrative class, receives, during the exercise of his functions, an insult (*oltraggio*) accompanied by words tending to attack his dignity or integrity," the offender is punishable by imprisonment from one month to two years. If the offence is committed in the presence of a court or judge, the imprisonment is to be not less than three months, and if it be only a simple gesture or threat, the culprit is punishable by not more than six months' imprisonment in the first case, and by not less than one month in the second. See "*Legislazione comparate al codice penale Italiano*." Most of the other penal codes of modern Europe contain provisions on this subject, varying but little from the Italian, except that some punish for attacks upon witnesses and others do not. The Prussian code appears to contain a special punishment for contempts of court committed by the press.

One of the most useful models of legislative enactment on this subject is to be found in the Indian codes. Section 228 of the penal code provides that whoever intentionally offers any insult or causes any interruption to any public servant while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to 1,000 rupees, or with both. The Code of Criminal Procedure (s. 473), provides that except in this case and in the case of certain other specified contempts (chiefly relating to such matters as refusal to give or produce evidence) "no court shall try any person for an offence committed in contempt of its own authority." [*Solt's Jour.*

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## Original Articles.

### *I. LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.*

In the Dartmouth College case, Chief Justice Marshall, speaking of the omnipotence of the British Parliament, after assuming as unquestionable that it can not only impair but entirely abrogate the obligations of public as well as of private contracts—of government as well as of individuals—by its laws, however perfidious or unjust the act might be, admits that independently of constitutional limitations, our state legislatures would possess the same power. And the same distinguished judge, in *Owings v. Speed*,\* took the position that a law of the state of Virginia, passed before the Federal Constitution took effect, could not be held invalid, although it deprived parties of land which had been previously granted to them by the state, and invested other persons with the title to it for private purposes.

The same principle has been since repeatedly affirmed and acted upon by other judges of the same court in deciding causes before it.†

\* 5 Wheat. 420.

† *Livingston v. Moore*, 7 Peters, 546; *League v. De Young*, 11 How. 185; *Herman v. Phalen*, 14 How. 79.

Years before, in the case of *Calder v. Bull*,\* it had been said by Iredell, J., that where there were no constitutional limitations on the legislative power, the consequence would inevitably be that whatever the legislative power chose to enact, should be lawfully enacted, and that the judicial power could never interpose to pronounce it void. And that, though speculative jurists had held that a legislative act against natural justice must in itself be void, no court would have the right to declare it so. It was consequently held that an act of the Connecticut legislature setting aside a judgment of one of its courts and granting a new trial, could not be held invalid, as it was not prohibited by the constitution of the state, and did not come within that clause of the federal constitution prohibiting the states from passing laws impairing the obligation of contracts. And so it was accordingly held in *Cooper v. Telfair*,† that an act of the legislature of Georgia, passed in 1782, attainting and banishing the plaintiff in a suit upon a bond, and confiscating his property for alleged treason, without trial or conviction, could not be held invalid because not prohibited by the constitution of Georgia, and the act was held good as a plea to the action.

The theory of the Supreme Court of the United States is, therefore, that the powers of the state legislatures are supreme except in so far as their exercise may be forbidden by the fundamental law, and that it will not hold as invalid or refuse to give effect to any law of a state legislature, even though in its judgment it may be contrary to the principles of natural justice, nor however arbitrary or unreasonable it may appear, nor whatever injustice it may seem to authorize, provided such legislation be within the scope of supreme legislative power, and does not violate some express or clearly implied limitation or restriction upon such power, to be found in either the federal or state constitution.

The same theory prevails, it is believed, in the judicial tribunals of the states themselves, according to the great weight of authority, although, as said by Iredell, J., in *Calder v. Bull*,‡ "some speculative jurists" have maintained a contrary

\* 3 Dall. 398.

† 4 Dall. 18.

‡ 3 Dall. 398.

opinion, and as we are aware, it has not been universally approved, and has been in several of the more recent cases departed from in practice.

Such must have been the opinion of the framers of our federal and early state constitutions. Else why such care in restricting the powers of legislative bodies from the enactment of unjust and oppressive laws, such, for instance, as bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts? All such acts would have been by their very nature, in a republican government, outrages upon justice, and could have been as well restrained by the judiciary without such restrictions, if the jurisdiction sometimes contended for, to pronounce legislative acts unconstitutional and void because impolitic, unjust or oppressive, had been supposed to exist.

Indeed, it was not generally understood at that day that the courts possessed the power to pronounce an act of the legislature void, even when coming clearly within the prohibitions of the constitution. Such power was, in fact, denied by some of the most prominent statesmen of that day. It is well known that Mr. Jefferson was opposed to the annulling power.\* And the cotemporaneous judicial annals of the country furnish several instances in which the judges hesitated about its exercise. In *Hayburn's case*,† in 1792, the Supreme Court of the United States avoided the responsibility by pocketing the case, under the pretext of taking it under advisement, although the law in question was most clearly unconstitutional and had been so unjudicially pronounced by the judges. In *Hilton v. United States*,‡ Judge Chase expressly declined to decide whether the supreme court constitutionally possessed the power to declare an act of Congress void because contrary to or in violation of the constitution; "but," said he, "if the court have such power, I am free to declare that I will never exercise it but in a very clear case." And in *Calder v. Bull*,§ Judge Iredell, after declaring that in his opinion any act of Congress or of the legislature of a state, violating the provisions of the

\* Letter June 11, 1815, 6 Jefferson's Writings. See also, *Federalist*, No. 48.

† 2 Dall. 409.

‡ 3 Dall. 171.

§ 3 Dall. 398.

federal constitution, would be unquestionably void, adds, "Though I admit that as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case."

In fact it never was definitely settled in this country that a court could pronounce a law void because repugnant to the constitution of the government, until 1803, when it was so decided by Chief Justice Marshall in the celebrated case of *Marbury v. Madison*,\* in which that great judge regarded the points in the case as both delicate and difficult; one of which was this very question of the jurisdiction and power to annul an unconstitutional law; and in a most elaborate opinion vindicated what has ever since been the plainest and most unquestioned law on this subject—that when a legislative act comes in conflict with the constitution, the latter is to be held the paramount law, and the act must be held by the court a nullity.

A proposition so plain to us at this day would seem to require no argument for its support; but the doubt which existed at that day demanded more than a bare statement of the proposition, and that demand was supplied by the eminent chief justice, by one of his most logical and convincing judgments. Had he gone further and held that the court could not only hold the law void in such case, but also whenever in its judgment it infringed upon the principles of equality, justice, or the so-called natural rights of the citizen, it would have startled the lawyers and statesmen of that generation.

How, with these doubts upon their minds, in this regard the framers of our early constitutions expected many of the restrictions upon legislative power contained in them to be enforced, is not so certain. We know, as a matter of history, that many of the public men of the country, perhaps a large majority of them, believed that the courts established by these constitutions would possess the power afterwards established, as we have seen by the case of *Marbury v. Madison*; but we also know that this was by no means the unanimous opinion, and that there were many of them openly hostile to such

\* 1 Cranch, 137.



power, and many more in doubt, and we have seen that even some of the judges of the Supreme Court, shortly after its organization, not only felt but expressed such doubts. Nor was there, it seems, for a long time any certainty as to the course which the judiciary of the country would adopt. It is, perhaps, not unfair under such circumstances to presume that whilst most of them looked hopefully to the judiciary as the conservator against the violation of such restrictions, others looked to the people to supply the remedy in case of need, and, perhaps others, with more faith in the integrity and honesty of human nature than subsequent experience has justified, hoped that the occasion for the remedy would never arise. Why the whole matter was not put at rest by constitutional provisions is not a little strange.

Assuming, then, that the correct doctrine is that no court in our system of government can disregard or pronounce void any legislative act, unless it conflicts with the higher law of the constitution of its government as expressed, or necessarily to be implied therein, the importance of such constitutional restrictions with us can not be overestimated. It is not, therefore, surprising that those on whom was imposed the task of devising those instruments, should have given their chief care to fixing the limits of legislative power; and that the convention of delegates from the states which met for the purpose of creating a common government for them, found that the most difficult and delicate part of its labor was not in the extent to which they should confer legislative power upon that general government, but in determining upon the restrictions which should be imposed upon the legislative power of the states so as to protect the common government from their encroachments, to secure republican forms of government, to protect private rights, and to prevent legislation by one, unfriendly to another, or upon subjects which should belong exclusively to the control of the common government.

It might well excite surprise that a convention for the purpose of forming a federal constitution, with no purpose of taking from the states the management of their own domestic

concerns, should have undertaken to provide for the security and protection of the private rights of property of their citizens against the legislative power of the states themselves. That provision should be made forbidding bills of attainder, *ex post facto* laws, or the conferring of titles of nobility was natural enough. Bills of attainder and laws *ex post facto* had become universally odious, from the tyrannical and cruel use for which they had been but recently so often brought into requisition in the mother country, to gratify the vengeance of political factions. As illustrated by the examples there furnished, they were nothing more than tyranny in its worst form. Titles of nobility were repugnant to republican forms of government based upon the idea of the equality of men. It was, therefore, consistent with the purpose for which they had met, that these things should be, by common consent, forever excluded from any possible foothold upon our soil. But that such a convention should have undertaken to provide for the protection of the private rights of individuals only so far as to prohibit the states from passing laws impairing the obligation of contracts, and there stopping short, is not so easily accounted for. There were certainly other violations of the private rights of property equally enormous, and as much to be apprehended, against which no provision is made, and no such abuse of this power of impairing the validity or obligation of contracts had been practiced in English legislation, as to attract attention, or as to bring upon it the odium which then attached to bills of attainder and *ex post facto* laws. Indeed, interference with contracts between individuals, as well as with their vested rights in property, is a species of legislation from which the British Parliament was and has always been peculiarly free, into whatever other extravagancies it may have been carried in times of political excitement; and, to the honor of that nation, its power in this respect may be said to exist in theory only. The phrase itself, "impairing the obligation of contracts," is not of the common law. Neither that law nor its history has made it familiar to us. Nor, it may be here remarked, can we derive aid from the decisions of the English judiciary tribunals or

from the common law, in our efforts to discover the meaning of this provision, except so far as we may derive it from the application of the general principles of that law. It had its origin in that august convention, and tradition alone informs us who its author was. As to the reasons for its introduction and adoption, we can be at no loss in conjecturing, if we read the history of the financial embarrassments of the people of that day, and of the astonishing bad faith of the debtor party in their endeavors to rid themselves of their pecuniary burdens, in which they were too often assisted by the legislative power. "Not only," says Judge Story, "was paper money issued and declared to be a tender in payment of debts, but laws of another character, well known under the appellation of tender laws, appraisement laws, installment laws, and suspension laws, were from time to time enacted, which prostrated all private credit and all private morals. By some of these laws the due payment of debts was suspended; debts were, in violation of the very terms of the contract, authorized to be paid by installments at different periods; property of any sort, however worthless, either real or personal, might be tendered by the debtor in payment of his debts, and the creditor was compelled to take the property of the debtor which he might seize on execution, at an appraisement wholly disproportionate to its known value. Such grievances and oppressions and others of a like nature, were the ordinary results of legislation during the Revolutionary War and the intermediate period down to the formation of the constitution. They entailed the most enormous evils on the country, and introduced a system of fraud, chicanery and profligacy which destroyed all private confidence and all industry and enterprise."\* See also what is said upon this subject by Marshall, C. J., in *Sturges v. Crowninshield*,† and the very interesting account given by Haywood, J., in *Townsend v. Townsend*,‡ of the struggle between the debtor and creditor classes in the early times of our history as a nation, and the clamor of the former for governmental relief.

In this condition of affairs, and while our federal constitu-

\* Com. on Const. § 1371. † 4 Wheat. 122. ‡ 1 Peck (Tenn.) 1.

tion was being framed by the convention which had met for that purpose, the Congress of the Confederation adopted as one of the fundamental articles of the compact between the territory northwest of the Ohio and the states, that, "in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in the said territory that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide* and without fraud previously formed;"\* and this principle it was, as we are told, which found more condensed expression in the provision of the constitution that "no state shall pass any law impairing the obligation of contracts."† And as it embodied but a maxim of justice and seemed to be demanded by the condition of the country and the lax system of legislation then prevailing, it seems to have been adopted without opposition or particular comment; and it is certain that it received but little notice in the discussions which followed upon the question of the adoption of the constitution—so little was the future importance to be attached to it at that time understood. It seems at once, however, to have commended itself to the approval of the statesmen of the day, and we consequently find the provision incorporated, in connection with the same restrictions in regard to bills of attainder and *ex post facto* laws generally, if not universally, in the state constitutions which were afterwards framed; and thus it has become one of the cardinal points in our political creed, that no state shall pass any law impairing the obligation of contracts. Before this time, however, it had been otherwise. The constitutions of the several states had left the power unlimited in the state legislatures, and we know from many sources that it was exercised often, and with shameful freedom. But, in the language of Haywood, J., in *Townsend v. Townsend*, *supra*, "the framers of the federal constitution believed it to be of indispensable importance not to leave this power any longer in the hands of the state legislatures. Experience had demonstrated the baneful effects of its exercise. The known disposition of man, excluded the hope that it would not be used for the same per-

\* 12 Wheat. 304.

† *Hepburn v. Griswold*, 8 Wall. 622.

nicious purposes in future. Under the smart of this experience, such were the feelings of the American people at the time, that not a dissenting voice was raised against the clause before us. No state required it to be expunged, nor did any state propose an amendment. It was universally received without an exception, and the effects of the clause were miraculous. Private and public confidence took deep root. The people of America were reinstated in the admiration of the world. The precious metals flowed in upon them. Paper money suddenly stopped in its career of depreciation, and took a stand from which it never departed; industry, revived universally; and to us in America was given a notable proof that whenever a nation is virtuous and honest it will prosper both in wealth and character, and that whenever a contrary course is pursued, such is the wise decree of Providence, that prosperity of either kind will not long follow in her train."

It is remarkable that the meaning of a provision, apparently so simple and so little considered at the time of its origin, should have become the subject of so much forensic discussion. Nothing more forcibly shows the absurdity of the popular idea that the law may be made so plain that all may understand. No language, it would seem, could more clearly convey the idea intended; and in one of the earliest cases which came before the supreme court, involving its application, it was said by Chief Justice Marshall that "it would seem difficult to substitute words which are more intelligible or less liable to misconstruction." And yet we know, as a part of the judicial history of the country, that no other words of the same number in our language have been the subject of more earnest debate; none on the doubtful meaning and application of which more weighty causes have been determined, and no question has furnished our legal reports with more interesting cases than that of their proper construction.

We propose, therefore, in this article to review the subject briefly.

It is to be remarked in the first place, that the prohibition does not apply to the common government which our federal

constitution establishes. The injunction is in terms upon the states; and upon this ground, astonishing as it may appear, it has been held by the majority of our Supreme Court that the general government may act in total disregard of the provision; and it has been gravely announced from that bench that "it can not be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless or partially fruitless"—an opinion, however, from which, in justice to the court, it must be said that three of the judges dissented.

Be this as it may, there can be no doubt but that the proviso in question, so far from having abridged the federal power, has been the occasion of adding greatly to the jurisdiction of its judicial department; for the 25th section of the judiciary act having provided for writs of error from the Supreme Court of the United States to the highest courts of the states in all suits in which is drawn in question the validity of a state law, on the ground of its repugnancy to the constitution of the United States, and in which the decision of the state court is in favor of the validity of such statute, the federal Supreme Court has been made the final arbiter of all questions arising under this clause—a result, we venture to say, never for a moment contemplated by the framers of the constitution, and one which, as we shall hereafter see, has been attended with the most important consequences. Hence comes the frequency with which cases involving this question as to whether certain acts of the state legislatures are void as impairing the obligation of contracts have come before that court, and its jurisdiction to decide thereon, which has added so largely to the power of the federal government to interfere with and arrest state legislation. This section of the act, indeed, in conjunction with the few prohibitory clauses of the constitution upon state legislation, has brought before the United States Supreme Court many of the most interesting and important causes ever decided by it.

It may be pertinent, however, to remark in this connection, as a part of the history of the constitutional clause in question that the power of Congress to enact this 25th section has

been very warmly contested by several of the highest courts of the states, and its validity strongly denied. In the case of *Hunter v. Martin*,\* this section of the act was vehemently assailed by the judges of the Court of Appeals of Virginia, of great distinction in that day, and the power of Congress under the constitution to invest the Supreme Court with any such appellate or revising power over the decisions of the state courts, was unanimously denied, and that court refused to enter or execute the mandate of the Supreme Court, reversing its judgment; and the question was not only treated judicially, but entered largely into the politics of the state at that time. In Georgia, also, this power has always been denied, and its attempted exercise treated with contempt. In 1830, one Tassels, having been capitally convicted under a criminal law of that state, was hung, notwithstanding the allowance of a writ of error from the Supreme Court of the United States on his application; and the legislature of the state went so far as to resolve that Georgia would "never so far compromise her sovereignty as an independent state" as to become a party in a cause sought to be thus carried into that court, and requested the governor of the state to disregard its mandate and process. See also *Paddelford v. Savannah*.† In Ohio, the supreme court of the state in *Piqua Bank v. Knoup*,‡ directed the mandate of the United States Supreme Court to be entered upon its records in conformity, as they say, with the uniform practice of the state, not, however, without a strong dissenting opinion by Bartley, C. J. And in *Skelly v. Jefferson Branch Bank*,§ the same court refused to be governed by the decisions of the Supreme Court of the United States, directly in point upon this question of the obligation of contracts, holding that it was not bound to do so, because the latter court stood in no such relation to the former as that of superior to inferior, and that while the opinions of the United States Court in *consimili casu*, might be entitled to the highest respect, it was not conclusive upon the

\* 4 Munford (Va.); S. C. 1 Wheat. 304.

† 14 Ga. 440.

‡ 6 Ohio (N. S.) 342; S. C. 16 How. 369.

§ 9 Ohio (N. S.) 606.

state court. It was further said that any other course would necessarily work injustice to one of the parties to the cause, as, if the court followed the decision of the United States Court and held the state law invalid, it would deprive him of his right of appeal. The views of the court being, therefore, directly opposed to those of the Supreme Court of the United States upon the same state of facts, especially as the latter court was not unanimous upon the point, it disregarded the decisions of that court and gave its judgment in the case according to its own views of the law.

It appears, therefore, that this power of the Supreme Court of the United States under this important 25th section, is neither unquestionable nor unquestioned, and that though it has been generally submitted to, it has been done reluctantly by some of the states.

Returning from this digression to the consideration of the constitutional provision itself, and observing that the *obligation* of contracts is the thing intended to be protected, it would seem that the natural order in which we should conduct our enquiry into its meaning, would lead us, in the first place, to define, if possible, the nature of the contracts which were meant as the objects of its protection ; in the second place, to fix the meaning of the word "obligation," and to distinguish wherein the obligation of the contract differs from the contract itself, if any such distinction can be drawn ; and lastly, to ascertain what legislation upon the subject of contracts will come within the prohibition. These questions, in all their different aspects, have often been before the courts, and our books of reported cases, and our text-writers furnish us with many explanations ; but as plain as the subject would seem, to the unprofessional mind, much yet remains to be explained, and much perhaps, that can never be explained or determined to the entire satisfaction of those whose duty it may be to make or to administer the law, as will always be the case where words so few, and really of such indefinite import can be invoked to annul legislation upon the most important affairs of life.

No term in the law is more comprehensive than the word



"contracts;" and nothing can be more certain than that it was not here used to embrace all such contracts as come within the legal definition. Chief Justice Marshall, in *Sturges v. Crowninshield*,\* defines a contract to be "an agreement in which a party undertakes to do or not to do a particular thing;" and this is said to be the most strictly legal definition of the word to be found in the books.†

There are confessedly many contracts embraced within this definition, or, indeed, within any other approved definition of contracts, which must be excluded from its meaning as used in this clause of the constitution. "This provision of the constitution," says the same authority in the *Dartmouth College* case, "never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice;" or, as said by the Supreme Court in another case, "contracts by which perfect rights, certain, definite, fixed, private rights of property, are vested." The contract must, therefore, be such as invests the one party with not only the moral, but the legal right to its fulfillment, and a correlative legal obligation upon the other. It must be such a contract as will sustain an action in a court of justice, either for its specific performance or for damages for its breach. The subject of the contract must, therefore, be of some value, and one about which the parties have the legal right to contract, and the parties must be capable of binding themselves, or those for whom they undertake to contract. There must also be a consideration which the law will consider valid; for without such consideration there can not be in the eye of the law an obligation to perform it, however it may be in conscience. It must not be for an immoral purpose, or for one prohibited either by the express provisions or by the policy of the law. In short, whenever the party upon whom the obligation rests can defend himself against its enforcement, the law, though subsequent, may declare the contract absolutely void, without being obnoxious to the objection of violating this constitutional restriction. This is self-evident; because in all such

\* 4 Wheat. 197.

† Metcalf on Cont. 3.

cases, though there may be the semblance of a contract, the law has never imposed an obligation, and there is, therefore, none to be impaired.

It has, however, been determined that the prohibition applies to executed as well as to executory contracts. In the case of *Fletcher v. Peck*,\* it was held that the legislature of the state of Georgia, after having sold lands belonging to the state, by deed executed by its governor, under the authority of a law passed for that purpose, could not repeal the law so as to divest the purchaser of his title on the alleged ground of fraud practiced in procuring its enactment; "for" says the chief justice, "a contract executed is one in which the object of the contract is performed, and differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant." And it was stated as the unanimous opinion of the court, that "the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States," from repealing the law under which the estate was held. • While the conclusion to which the court arrived in this case has been generally adopted, it must be admitted that the reasoning of the learned judge is by no means satisfactory. A grant is certainly a contract performed; but it does not follow that a contract performed is still a contract, nor is a grant or a deed always an estoppel. On the contrary, we know that in conveyances of real estate the estoppel grows out of the covenants in the deed, and that without a covenant of warranty, or something equivalent, there is no estoppel; and that unless there is some such covenant the grantor may recover, even from his own grantee, upon an after-acquired title. The contract, therefore, and the estoppel, if any there be, arise by reason of the covenants, and not by reason of the

\* 6 Cranch, 87.

mere grant. This, at least, seems to have been the opinion of Johnson, J., who, while concurring in the judgment of the court, took occasion to dissent expressly from the reasoning of the chief justice, and to say that it was much to be regretted that words of less equivocal signification had not been adopted in this article of the constitution; that there was difficulty in saying that the words, "acts impairing the obligation of contracts," could be construed to have the same force as the words "acts impairing the obligation and *effect* of contracts;" and that a grant or conveyance by no means necessarily implied the continuance of an obligation beyond the moment of executing it, and was generally but the consummation of a contract, was *functus officio* the moment it was executed, and continued after that to be nothing more than the evidence that a certain act had been done. But he denied the power of a state to revoke its own grants "on a general principle, on the reason and nature of things, a principle which will impose laws even on the Deity." And in the subsequent cases of *Terrett v. Taylor*,\* and *Society, etc., v. Pawlett*,\*\* Judge Story, who had been counsel for the defendant in *Peck v. Fletcher*, while holding that the grant of a state was irrepealable, put the doctrine upon the ground that it would be "utterly inconsistent with a great and fundamental principle of republican government—the right of the citizen to the free enjoyment of property legally acquired." And in *Wilkerson v. Leland*,† the same reasons for the doctrine are reiterated by the same judge.

This reasoning is, however, totally inconsistent with the oft-repeated admissions of the same court, that there is nothing in the constitution of the United States which prohibits a state legislature from divesting rights already vested at its pleasure; *Satterlee v. Matthewson*,‡ *Watson v. Mercer*,|| *Charles River Bridge v. Warren Bridge*;§ as well as with the doctrine before stated, which these cases sustain, that no court can hold a legislative act void, merely because it violates an abstract rule or principle of justice, unless it at the same time conflicts

\* 9 Cranch, 43–292.

† 2 Peters, 413.

\*\* 4 Peters, 480.

|| 8 Peters, 110.

† 2 Peters, 657.

§ 11 Peters, 540.

with some plain constitutional prohibition. It would seem, therefore, to be the result of these cases and of *Fletcher v. Peck*, that the constitution of the United States would protect the owner of property from being deprived of it for the benefit of his vendor, but not if it should be taken from him for the benefit of some other person. In other words, under the federal constitution, property which he had bought from B. could not be taken from him and given to B., because there was an executed contract between them, but it might be given to A. from whom he had not purchased, there being no such contract between him and A., and he must seek his protection from the latter grievance in the constitution of his state. The enormity would certainly be as great in the one case as in the other; and it is certainly making a very narrow distinction to say that it may be perpetrated in the one case because done in favor of a stranger to the title, but not in favor of the vendor because of some imaginary contract, that he will not disturb the possession of his vendee. *Fletcher v. Peck* has, however, been followed without question, and we find the law laid down accordingly in the books as settled. But as the state constitutions have generally, if not universally, definitely provided against the impairing of executed as well as of executory contracts, the subject is perhaps of but little importance, except so far as it is relied upon as a ground of the jurisdiction of the Supreme Court of the United States, under the 25th section of the judiciary act.

It has never been, nor can it be questioned, that this clause protects implied as well as express contracts; for when the law makes a contract between the parties without their expressed assent or agreement, either from their acts or from the relation in which they stand towards each other, it would be absurd to say that it imposed no corresponding obligation, or that the obligation thus imposed was less binding or less worthy of its protection than one arising from the most explicit agreement; and it may admit of question, whether the prohibition does not extend even to the protection of those engagements which are said to depend not upon contract but upon a principle of natural justice, such for instance as the

right to contribution among co-sureties.\* There would manifestly be no reason in restricting the general language of the provision to such obligations as grow out of the express stipulations of the parties; and where the law supplies the contract from the consideration and other circumstances and enforces the remedy, though it may be against the will of the party, the obligation of such contract can be none the less than where it is voluntarily assumed. The two kinds of contracts, in fact, differ in nothing except in the different modes of proof by which they are established. Indeed, in every contract, however express it may be intended to be, that which is implied is equally important with that which is expressed. All contracts are made with reference to some law which is understood by the parties to be incorporated into their agreement, which may be either the law of domicil, of the place of contract, or of performance, to which appeal is to be made for the rule of its construction and mode of its performance. This law, whichever it may be, is implied in every agreement, and becomes as much a part of it as the very words of the parties. Such, at least, is the theory now universally assumed, though the position was much discussed in the case of *Ogden v. Saunders*,† and, as an abstract principle, was strongly assailed by some of the judges, and especially by Chief Justice Marshall.

How far the legislative power may change or repeal the law thus incorporated with the contract, without impairing its obligation, has given rise to some of the most interesting cases upon this subject. The question is, of course, one to which no definite answer can be given, and when it arises must be settled by sound judicial discretion and common sense, without much aid, either from the established principles of common law, or from what has been decided upon the subject in our own courts. Almost all legislation, even the most necessary and proper, though upon subjects foreign to private contracts and with no reference to them, may still, and, as we know, often does, seriously affect their value and importance to the par-

\*See *Hays v. Ward*, 4 John. Ch. R. 123.

† 12 Wheat. 213

ties, increasing or diminishing, as the case may be, the actual burden upon the one and the benefit to the other; and, of course, between such legislation as affects them incidentally merely, and that which is intended directly to impair their obligation, there must necessarily lie much debatable ground. The most that can be said is that such legislation, whether directly for the purpose, or merely incidental, must not substantially impair the obligation; nor, while it preserves to the party the semblance of the full benefit of his contract, deprive him of any material advantage either as to the time or the manner of its performance. Nor is the letter of the contract always the full measure of its obligation. The meaning of the terms used by the parties may be controlled by usage. To dispense, therefore, with all but a literal compliance might, in many cases, be substituting the shadow for the substance, and might be as flagrant a violation of the law as the total rescission of the contract. On the other hand, it would be going too far to say that this provision of the constitution guaranteed to him the exact measure of benefit for which he bargained; for all contracts must be understood as entered into with reference to the possible exercise of the rightful authority of the government.

The nature of the subject, as will be at once apparent, admits of no more definite limits between the extent of the prohibition on the one side and the legislation inhibited upon the other. The line of conflict must be settled for each case according to these general principles. Uncertain as they are, however, they are well recognized and everywhere admitted. But in their application there has been a very wide diversity, and the latitude to which the human mind may go in finding the boundary between the forbidden and the unforbidden, between that which lies without and that which lies within the restriction, is very remarkably shown in the conflicting judgments of the Supreme Court of the United States, in the cases of *Hepburn v. Griswold*,\* and the *Legal Tender* cases,† and in the opinions of the judges separately delivered in those cases.

The question to be decided in the former of these cases,

\* 8 Wall. 603.

† 12 Id. 457.

was whether the payee of a note given before the act of Congress of 1862, making United States treasury notes a legal tender, was obliged to receive such notes in payment of his debt. In the latter was also to be considered the question of the validity of the act of Congress so far as it concerned contracts made after as well as before its passage. It was stated by the chief justice in *Hepburn v. Griswold*, that at the time of the lowest depreciation of these notes after the date of the act, one thousand dollars of coin which the payee of the note before the passage of the act would have had the right to demand, would have purchased more than twenty-eight hundred dollars in such notes. The decision of the case turned mainly upon two questions—whether the act impaired the obligation of contracts, and whether, if so, Congress could constitutionally enact it. The majority of the court held that it did impair the obligation of such contracts as were made before its passage, inasmuch as it required creditors to receive in payment a thing entirely different from that for which they had contracted, and of much less value, and they denied the power of Congress under the constitution to pass any such law, there being no such power either expressly or impliedly given in that instrument, and because it was inconsistent with its spirit. The minority of the court, however, while admitting that the act was one undoubtedly impairing the obligation of contracts, claimed that the law was constitutional and valid, inasmuch as the power to pass it was not expressly forbidden in the constitution, and could, therefore, be exercised by Congress as necessary and proper to accomplish the objects of the government. The judgment of the court was, however, by a majority of five to three, that the act was unconstitutional so far as it affected contracts entered into previous to its passage. But as is well known, the very same questions were not long afterwards again brought before the same tribunal in the *Legal Tender Cases*, its bench having in the mean time been altered by the resignation of one of the judges and the appointment of two new judges, under the act of Congress increasing the number of the court, when the judgment in *Hepburn v. Griswold* was overruled by five to

four, and it was held by Strong, J., delivering the opinion of the court, that the act did *not* impair the obligation of contracts made either before or after its passage. "It is true," said he, "that under the act a debtor who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compelled to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened, can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals; but neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other, constitutes its obligation. There is a well recognized distinction between the expectation of the parties to a contract and the duty imposed by it. Were it not so, the expectation of results would always be equivalent to a binding engagement that they should follow. But the obligation of a contract to pay money, is to pay that which the law shall recognize as money when the payment is to be made." And Bradley, J., in his concurring opinion, says: "There are times when the exigencies of the state rightly absorb all subordinate considerations of private interest, convenience or feeling; and at such times the temporary though compulsory acceptance by a private creditor of the government credit in lieu of his debtor's obligation to pay, is one of the slightest forms in which the necessary burdens of society can be sustained. Instead of being a violation of such obligation, it merely subjects it to one of those conditions under which it is held and enjoyed."

Such are specimens of *ratio decidendi* which brought the minds of these learned judges to the remarkable conclusion that a law compelling the creditor to receive the "promises to pay" of the government for the dollars and cents for which he had bargained, did not impair the obligation of his con-



tract. Those who may be curious to see how satisfactorily such arguments may be refuted, we refer to the able opinion of the chief justice in the case in 8th Wallace, and to the opinions of the dissenting judges in the *Legal Tender Cases*. Practically, such reasoning would seem to lead inevitably to the result that if, after a contract should be made to pay dollars, the Congress of the United States should enact that thereafter dollars should be eagles and eagles dollars, the debtor would be bound to pay eagles when his contract was for dollars, and the creditor to receive dollars when his contract was for eagles ; from which it would result that no party to a contract, even the most explicit, to be performed in the future, could know with certainty what he would have the right to demand or what might be demanded of him on the day of performance. There could not be one law for the debtor and another for the creditor. And thus it would seem to have come about that an open device for the relief of debtors, as old as the time of the ancient Solon, who is said to have been its inventor, often since his time resorted to by bankrupt nations, and, as was supposed, universally condemned as rank injustice to the creditor, which no plea of necessity even could justify—the very injustice which gave rise to the prohibition in question, has come to be upheld as defensible upon principles of right and natural equity as well as upon constitutional grounds.

A distinction has been attempted to be drawn between such legislation as affects merely the remedy and such as affects or relates to the obligation of the contract, the former being held in some of the cases to be permissible, while the latter is strictly interdicted by this provision of the constitution ; and it has been argued frequently, and we believe that such is the prevailing impression and the usual dictum of the books, that the obligation of a contract is something entirely different from the remedy for its enforcement. But this proposition has not always been admitted, and the array of ability and argument on the other side of the question forbids its assumption as a settled proposition. But, however it may be in the abstract, the question would seem to be one of little if

any practical importance, and whoever will read the grave discussions upon the subject, must be impressed with the idea that it is one more befitting schoolmen than practical lawyers.

The position was first taken by counsel in the argument of *Sturges v. Crowninshield*,\* and it was admitted by the chief justice in his opinion in that case that the distinction existed "in the nature of things," and that without impairing the obligation of the contract the remedy might be modified as the wisdom of the legislature might direct. And again in his dissenting opinion in *Ogden v. Saunders*,† he argues that the obligation and the remedy originate at different times; that the obligation to perform is coeval with the undertaking to perform; that individuals do not derive from government their right to contract, but bring that right with them into society; that the obligation is not conferred on contracts by positive law, but is intrinsic and grows out of the act of the parties; that the obligation originates with the contract itself and operates anterior to it, but that the remedy operates upon a broken contract and enforces a pre-existing obligation; that in a state of nature the remedy to enforce this intrinsic obligation is the natural and original right of coercion which, for the sake of the general peace, is surrendered by the individual and prohibited by society when he comes into it, and a more safe and certain remedy is given in its stead; that the obligation of contracts, not being the creature of society, may and does exist without law and independently of it, and that, therefore, the law might act upon the remedy without acting on the obligation. From which he concludes that the laws pertaining to the remedy do not enter into the contracts of parties at all, but that insolvent laws which discharge the debtor, though passed before the contract is made, impair its obligation, which arises and exists independently of all law.

However unanswerable this may be as abstract reasoning, it can hardly be reconciled with the opinion of the same judge in the *Dartmouth College Case*, that the contracts embraced in this provision are only such as can be enforced in some court of justice or for the breach of which the law has pro-

\* 4 Wheat. 122.

† 12 Wheat. 346.

vided a remedy. There are many contracts, both express and implied, which can not be so enforced. No remedy whatever is provided for their breach. And because no such remedy is provided they are not contracts within this provision of the constitution, and are consequently subject to state legislation as though the provision had never been made. It is not clear how, if no contract exists unless a remedy exists for its breach, the remedy is no part of the contract. Nor would it, we apprehend, be easy to reconcile it with his statement in *Sturges v. Crowninshield*, that the obligation of a contract was the law which binds the parties to perform their agreement. And when pressed with the argument that if the remedy be no part of the obligation, and, therefore, at the mercy of legislative interference, it might be wholly taken away and thereby the value of the contract wholly destroyed, the distinguished judge could only answer that this would be a case of misgovernment, the anticipation of which would be disrespectful to the legislative power of the states, and that an opinion as to the remedy in such a case would be premature. There can certainly be no remedy without an obligation to perform, and it is equally clear that there can be no contract, and consequently no obligation within the meaning of the constitution without a remedy to enforce its performance. So that if not one and the same thing, the obligation and the remedy are, at least, to use the language of the chief justice in the same case, such "sympathetic essences that they live, languish and die together."

It has never been doubted that a state might alter its laws provided for the enforcement of contracts; in other words, for the remedy for their non-performance, even of such as are already in existence. It may, for instance, so change the jurisdiction of its courts as to shift the remedy from one to another; or it may abridge or extend the time within which such remedy shall be enforced. But to what extent it may go in making such changes in its remedial laws so as to affect existing contracts it is impossible to define; and all that can be said is that such legislation can not be carried so far as to substantially or materially lessen the value of such con-

tracts. It can not be denied that while the contract remains the same everywhere, the remedy may vary according to the time or the forum in which it may be sought. But does it necessarily follow from this that the remedy and the obligation are entirely distinct? Such a distinction seems to us arbitrary and unnecessary. The obligation of a contract can certainly be as effectually impaired or destroyed by interference with the remedy as by the most direct legislation to that end; and the instances in which it has been attempted since the case of *Ogden v. Saunders*, show that the assumption by the chief justice in his opinion in that case, of the improbability of such attempts, was far from being well-founded.

We must confess our inability to be convinced of the existence of this wide distinction between the obligation and the remedy, although the arguments in its support come from a source regarded as almost infallible upon questions of law; and are constrained to concur with those who maintain that all contracts are made with reference to the remedy by which they are to be enforced, as well as to the thing to be performed, and that, therefore, the remedy does enter into and constitute, in part at least, its obligation. That contracts are understood to be entered into in contemplation of the contingency that the remedy may be changed by the law-making power in so far that the obligation and value of the contract be not substantially impaired or changed. And this upon the ground that it never could have been intended by the clause in question, to restrict the states in their modes of administering justice, as a matter of internal policy with which the inconvenience of particular individuals should not be permitted to interfere, numerous instances of which are to be found in the laws which exempt executors and administrators from suit for certain periods after their qualification; the exemption of certain officers from arrest whilst in the discharge of their duties; of witnesses whilst in attendance upon courts; of voters at elections; in laws limiting the time within which actions must be brought, and many others which might be given, none of which had ever been regarded as acts impairing the obliga-

tion of contracts; that the right of the creditor to the aid of the public arm for the enforcement of contracts can not be absolute and unlimited, regardless of the necessities or policy of society. That it would be absurd to contend that the clause in question could have meant, that when the interests of parties to contracts and the general good of society came in conflict upon a mere question of remedy upon such contracts, the latter must give way to the former when with the substituted remedy, the one party to the contract obtained substantially the thing for which he contracted, and the other was only required to perform substantially that which he agreed to do. That while the remedy and the obligation are so inseparable that the one can not be impaired without correspondingly impairing the other, there must be, from the necessity of the case, some incidental power reserved to the states of controlling the remedy, to be limited and controlled, however, by the reasons of policy and necessity on which it is based; and that, whenever the motive, the policy or the object of such legislation affects it with the imputation of violating the obligation of contracts, it will come within the prohibition of this clause, equally with the most undisguised enactments to that end; for if all laws appertaining to the remedy are to be deemed exceptions from the meaning of the constitution, it is hard to see where a limit can be placed to such legislation, or what right the judiciary can claim to disregard it. In the language of Haywood, J., in *Townsend v. Townsend*,\* "the legislature may alter remedies; but they must not, so far as regards antecedent contracts, be rendered less efficacious or more dilatory than those ordained by the law in being when the contract was made, if such legislation be the direct and special object of the legislature, apparent in the act made for the purpose. Though possibly if such alteration were the consequence of a general law and merely incidental to it, which law had not the alteration for its object, it might not be subject to the imputation of constitutional repugnance."

Numerous cases have, however, been decided upon this

\* 1 Peck (Tenn.) 1.

distinction, and it has been very generally assumed that laws affecting the mere remedy are not obnoxious to the objection that they contravene the prohibition as to impairing the obligation of contracts. To this effect, as we have seen, was the argument of the chief justice in his dissenting opinion in *Ogden v. Saunders*, in which he went so far as to say that if the state should withhold the remedy, or afford one merely nominal, it would be a case of misgovernment which would only leave to the creditor the chances of finding the debtor or his property within a jurisdiction which did afford a remedy. A majority of the judges, however, did not entertain the same opinion, and, as it seems to us, for the better reason. The great weight of the authority of the chief justice and of Judge Story, who concurred with him, seem, however, to have overborne that of the majority of the court, and to have led generally to the adoption of their theory. Most of the cases, however, which assume that the remedy is entirely within legislative control, qualify the doctrine by requiring that such control can be exercised only in such manner that a substantial remedy shall be left to the party. But unless such laws come within the constitutional prohibition, it is difficult, as has been observed, to see on what ground the judicial arm of the government can interpose. If the remedy constitutes no part of the obligation, which alone is guarded by the constitution, no restriction is put upon the legislative will as to the extent to which it may alter or abridge such remedy. There remains no longer a question of constitutional power, because there is no constitutional prohibition unless it be provided by the states themselves; and there could, of course, be no jurisdiction in the United States Supreme Court to pronounce any law invalid as long as it be confined to the mere remedy, no matter how grossly unjust it might be, and even though it should amount to a total denial of justice.

This view of the subject is supported by the more recent decisions. We believe it may be stated as the result of such as have been best considered, that wherever the express or direct object and motive of legislation, no matter how exclusively it may affect the remedy, has been to defer the compul-

sory performance of existing contracts beyond the time fixed by law at the time of their inception, or to lessen the security or the means then provided for enforcing such performance, such legislation has been held unavailing, because obnoxious to the objection of impairing the obligation of such contracts.

The first and leading case upon the point was that of *Bronson v. Kinzie*,\* in which it was held by the Supreme Court of the United States, that a law of the Illinois legislature giving time to the mortgagor to redeem from a sale under the mortgage, which right he did not have by the law existing at the time of its execution, impaired the obligation of the contract, and was, therefore, void. It was held that the right secured by the mortgage was substantially nothing more than the right to sell the mortgaged premises, free and discharged of the equitable interest of the mortgagor; that by the law at the time of its execution, the right thus to sell was the law of the state, was annexed to the contract at the time it was made, formed a part of it, enhanced the value of the security, and that consequently any law giving a right of redemption after such sale, changed the remedy and impaired the security. The same thing exactly was repeated in the decision in *Howard v. Bugbee*,† in reference to a similar law of the state of Alabama. And although in the case of *Bronson v. Kinzie*, the parties had, by their express stipulation in the mortgage, provided a remedy for the creditor in default of payment, by authorising him to sell the land, the court held this to be a matter of no consequence, as in the absence of such a stipulation the law would have provided the same remedy, which it held would have been impaired by the law in question.

So in *McCracken v. Hayward*,‡ it was held by the same court that a law which prohibited property from being sold on execution for less than two-thirds of its appraised value was, for the same reason void as to executions issuing upon judgments previously existing; and in *Gantley's Lessee v. Ewing*,§ the same question arose as to a law of Indiana providing that

\* 1 How. 311.

† 24 How. 461.

‡ 2 How. 608.

§ 3 How. 707.

mortgaged property should not be sold to satisfy the mortgage for less than one-half its value, and was decided the same way, Catron, J., who delivered the opinion of the court, saying that the right and a remedy substantially in accordance with the right, were equally parts of the contract secured by the laws of the state where made, and could not be changed so as to affect its obligation. To the same effect is *Curran v. Arkansas*.\*

These cases, which have established the law of the Supreme Court of the United States in accordance with the opinions of Washington, J., in *Green v. Biddle*,† and of the majority of the judges in *Ogden v. Saunders*, may be considered as putting the remedy and the obligation of contracts upon the same ground of inviolability under this clause of the constitution, except as before indicated. And we accordingly find that in the great majority of subsequent cases which have involved the question, they have been so treated, notwithstanding the occasional use of general expressions to the contrary.

There are to be found, however, as is well known, a number of cases in conflict with this view of the subject; and the refined and subtle distinction which has been attempted to be drawn between the obligation and the remedy has been made the pretext for many departures from what seems the true meaning of the constitution. The periodical recurrence of embarrassed finances and distressed debtors continues to give rise to the same clamor for relief which, but for the conservative power of the judiciary, would lead again to general distrust. And when we see legislative acts empowering juries to judge of the validity and value of the consideration of contracts, and to find their verdicts accordingly, or suspending the collection of debts for one or any number of years, and others of similar character, which may be found upon some even of our more recent statute books, upheld by the courts, as has been sometimes done, upon the ground that such laws affect the remedy and not the obligation, a strong argument is furnished, at least, for the *policy* of holding that the distinction claimed does not exist.

\* 15 How. 319.

† 8 Wheat. 1.



Practically, by far the most numerous as well as important causes in which the clause in question has been invoked to restrain state legislation, have been those in which the thousands of corporations of the country have sought protection under it. The celebrated Dartmouth College Case having established that the laws which created these corporate bodies were contracts between them and the government of their creation, inviolable under this provision of the constitution, (whether wisely or unwisely may admit of argument) they have not been slow to assert their immunity from governmental interference, the consequence of which has been many a heated contest in the legal forums of the country as to the respective rights and powers of the sovereign and its creature; and this has in but too many instances resulted in the discovery that the creative power had called up and put life into agencies which would not down at its bidding. No cases can be more instructive upon this branch of the law than those which this struggle has brought before the courts; but the limit to which this article is restricted, forbids any extensive notice of them.

Limitations upon the legislative power of taxation which were found in the charters of many of them, and which were claimed as contracts inviolable under this clause of the constitution, have been extremely prolific of litigation; and a brief account of the group of cases, the first of importance involving this question, brought first before the courts of Ohio and carried thence to the Supreme Court of the United States, may not be uninteresting.

The legislature of that state having, in 1845, passed a general banking law, one provision of which was, that every banking company organized under the act should semi-annually set off to the state six per cent. of its profits in lieu of all taxes for which the company would otherwise be liable, some fifty companies were formed under it with an aggregate taxable property of about eighteen millions of dollars. In 1851 an act was passed providing that bank stock should be assessed at its true value and taxed for state, county and city purposes to the same extent as other personal property. As

this rate was much more than that prescribed by the act of 1845, the banks refused to pay the excess and suffered themselves to be sued by the tax collectors, relying on the act of 1845 as an irrevocable contract which stood protected by the constitution of the United States. A number of these cases were appealed to the supreme court of the state, which was one of very distinguished ability. They were there argued at great length by able counsel, and the court, after a laborious examination of the questions involved, unanimously decided that the act of 1845 imported no contract, that the banks organized under it should not be further taxed than therein provided, and that the legislature had no power to surrender or restrict the right of the state to tax any of the property of individuals or corporations otherwise subject to it, so as to tie the hands of subsequent legislatures, and that if any such thing had been attempted by the act of 1845, it was to that extent void. These positions were supported by all the judges of that court, "in opinions," says Catron, J., "deeply considered and manifesting a high degree of ability." They also expressed the opinion that an ordinary charter of incorporation was not a contract within the meaning of the constitution.

When taken to the Supreme Court of the United States these cases were again elaborately argued and attentively considered. The judgment of the state court was reversed by a divided bench, Catron, Daniel and Campbell, JJ., dissenting from the opinion of the majority, and agreeing in their views with the judges of the Ohio supreme court, upon the proposition that a legislature can make no contract to bind the state as to future taxation.\*

This same question as to the power of the legislature of a state "to sell, give or bargain away forever the taxing power of the state," has recently again come before the Supreme

\* *Knoop v. State Bank*, 1 Ohio, (N. S.) 603; S. C. 16 How. 369; *Bank of Toledo v. Bond*, 1 Ohio, (N. S.) 622; *Ohio Life Ins. and Trust Company v. Debolt*, 1 Ohio (N. S.) 563; S. C. 16 How. 416; *Mechanics Bank v. Debolt*, 1 Ohio (N. S.) 591; S. C. 18 How. 380. See also *Dodge v. Woolsey*, 18 How. 331; *Jefferson Branch Bank v. Skelly*, 1 Black, 436.

Court of the United States, in the *Home of the Friendless v. Rouse*, and *Washington University v. Rouse*,\* and the court was again divided, the chief justice and Miller and Field, JJ., dissenting from the opinion of the majority, which sustained the power and reversed the judgment of the state court.

It will thus be seen that the question at last resolves itself into one of the legislative power to enact laws of this character; upon which subject there have been conflicting decisions in the state courts, and, as we have seen, a difference of opinion among the judges of the federal Supreme Court, whenever it has come before them.

There is no doubt that the courts in many cases have gone further in sustaining the claims of corporations to privileges and exemptions than was ever contemplated by the leading case of *Dartmouth College v. Woodward*, which has been always appealed to, and has never failed to furnish plausible arguments to support even the most startling pretensions of these incorporeal bodies. In the opinions of some it would seem that they are entitled to enjoy more than the ordinary immunities from the burdens of citizenship, and that the benefits which they are supposed to confer upon the body politic are a full compensation for all such exemptions and privileges as the legislature may think proper to grant them, and in this regard they are supposed to stand upon a higher plane than the individual citizen. It is, however, to be borne in mind that whenever the act of incorporation, though it may be called a contract, is one of doubtful construction, all such doubts are to be solved in favor of the public and against the monopoly, in which respect, by all the authorities, the rule applicable to it is the reverse of those applied to other contracts. In other respects the law may be considered as settled, that corporations are as much subject to the control of the legislative power as individuals, unless otherwise provided in their charters of incorporation. But as plain as this proposition may appear, it is to be apprehended that the language of Miller, J., in *Washington University v. Rouse*,\* namely, that in deciding upon "the validity of the contract, this court

\* 8 Wall. 430-444.

† 8 Wall.

has, in our judgment, been at times quick to discover a contract that it might be protected, and slow to perceive that what are claimed to be contracts were not so by reason of the want of authority in those who profess to bind others," is of more general application than is there given it.

Numerous other questions of great interest to the profession have grown out of this provision of our federal constitution, some of which we proposed to refer to when we commenced this article; but we find that to go over the ground as we had intended, would carry us far beyond the limits to which we are confined. Nor could we hope, even if space and opportunity favored, to produce what we consider a great desideratum with the profession, a treatise upon the subject in any respect commensurate with its importance.

R. HUTCHINSON.

MEMPHIS, TENN.

## II. CONTRIBUTIONS TO THE HISTORY OF THE ROMAN LAW IN ENGLAND.

### I. THE PERIOD OF THE ROMAN SUPREMACY.

The Roman law has been accepted by almost all the civilized nations of modern times, as one of the most valuable contributions of antiquity. Nevertheless there is one great nationality which has not only refused to accept this system of jurisprudence as its own, but has even denied, in a great measure, its general excellence.

In the courts of England and those countries which derive their jurisprudence from her, the decisions of an English judge, who lived in the dark ages of law and of literature, possess more authority, as a rule, than the best considered opinions of Ulpian and Papinian.\* "It matters not," says Blackstone, "what the pandects of Justinian \* \* have ordained. They are held of no more intrinsic authority in England than the laws of Solon and Lycurgus."† But this sweeping declaration, while embodying the general truth, admits of some modifications, as I hope to be able to demonstrate in the following pages.

I shall endeavor briefly to trace the history of the Roman law in England, to recount its struggles to regain supremacy there, and to describe as far as possible the final result.

For the purposes of this historical investigation the legal history of England may be conveniently divided into five periods, namely: I. The period of the Roman supremacy. II. The Saxon supremacy. III. The Danish supremacy. IV. The supremacy of the Norman Kings until the final uni-

\* Several works have been written by English jurists to prove the superiority of their national law over all other systems. Among them, the most successful, perhaps, is the well known Latin treatise of Fortescue, "*De Laudibus Legum Angliæ*."

† Commentaries on the Laws of England, vol. III. cap. 7.

fication of the Normans and Saxons. V. The later history of the Roman law in England and her colonies.

I. The historical sources of this period are necessarily very limited, and many important questions are matters of the vaguest conjecture.

We know that Julius Cæsar, when he invaded Britain, found a population there which very closely resembled the Gauls. In each community the judicial authority was wholly in the hands of the Druids, who passed upon all disputes, both private and public, and from their decision there was no appeal. All that we know of the legal institutions of the Gauls applies as well to those of Britain; for, as Cæsar informs us, both the religious and the judicial systems of the Druids had their origin in the latter country, and the Gauls were obliged to journey thither whenever they desired to drink at the fountain-head of their jurisprudence.\* No changes were made by Cæsar in the institutions of the Britains, inasmuch as his troops merely overran a portion of the country, and then abandoned it to itself.† The Britons retained their freedom about one hundred years, until the time of Claudius, who reduced them to a state of complete submission; and after Vespasian and Domitian had put down several insurrections and destroyed the last trace of freedom,‡ the Romans appear to have had very little trouble with their British possessions until the downfall of the empire.§ Judg-

\* Cæsar (De Bell. Gall. vi. 13), says of the Druids of Gaul: "Nam fere de omnibus controversiis de publicis privatisque constituunt; et, si quod est admissum facinus, si cædes facta, si de hereditate, si de finibus controversia est, iidem decernunt; præmia pœnasque constituunt: si qui aut privatus aut publicus eorum decreto non stetit, sacrificiis interdunt. \* \* \* *Disciplina in Brittannia reperta, atque inde in Galliam translata esse existimatur; et nunc, qui diligentius eam rem cognoscere volunt, plerumque illo discendi causa proficiscuntur.*" Compare Macpherson, Introduction to Ossian.

† Tacit. Agric. cap. XIII. Igitur primus omnium Romanorum D. Julius cum exercitu Britanniam ingressus, quanquam prospera pugna terruerit incolas, ac litore potitus sit, potest videri ostendisse posteris, non tradidisse \* \* \* ac longa oblivio Britannicæ. \* \* \*

‡ Tacit Ann. lib. XII. cap 31; XIV. 30, passim.

§ Hume, History of England, vol. 1, pp. 6-12.

ing from the silence of the historians, Britain was one of the most peaceable of all the provinces;\* and this leads us to the question which we are called upon to solve, namely: Was the Roman civil law introduced among the aborigines? Notwithstanding the absence of any very direct testimony, I venture to answer this question in the affirmative. I lay particular stress upon a remark of Suetonius, who declares that the entire system of the Druids was abolished by an edict of the Emperor Claudius.† Now the Druids were, as we have seen, both legislators and judges. They had taken upon themselves the entire administration of the law, and their overthrow would have left the people without the means of settling the most trifling disputes, had not the Romans extended to them the protection of their courts. But was the Roman dominion so general over the entire island as to be capable of passing upon all minor and purely local controversies? To this it may be answered, that the Roman authority must have been very widely extended, in order to have brought about the complete overthrow of the Druids; and that in every community in which the Roman authority was strong enough to break the power of the Druids, it must have been strong enough to supply their place. But we have a further proof of our position in this, that it was the constant effort of the Romans to introduce their laws among the aborigines of Britain. Tacitus in describing the founding of the colony at *Bamoludinum*, writes: "Claudius says that one of the purposes of the founding was to impress upon the aborigines the duty of obedience to the laws."‡ We possess besides this some other direct testimony that the Roman law was not only introduced into Britain, but also among the individual inhabitants, and was freely accepted by them. Juvenal, for example, says: "*Gallia causidicos docuit facunda Brittanos.*"§

\* Gibbon remarks that England was also one of the most important provinces. *History of the Decline and Fall of the Roman Empire*. Vol. II, p. 125.

† *In Vita Claudii*, cap. 25. *Druidarum religionem penitus abolevit.*

‡ *Ann. Lib. XII. cap. 32.*

§ *Sat. xv. III.*

The "causidici" were without doubt advocates who pleaded in civil cases; as is shown by several passages in the Latin authors. Seneca makes a humorous reference to their profession in his satire "De Morte Claudii."\*

The evidence which we have from the words of Juvenal is strengthened by a passage in Agricola, which informs us that the Romans were induced to build "fora" and that the toga was quite common among them.†

The "fora" were doubtless modeled after the style of the Roman forum, *i. e.* they were places where the courts were held. As regards the toga, it had by this time ceased to be an article of daily apparel.‡ It was then only worn on particular days, and, in the provinces, only on the occasion of an appearance before the court.

It may be urged that it was not the practice of Romans to deal so severely with a people they had subjugated, but that it was rather their custom to permit such nations to retain their ancient laws and religion. But the peculiar character of the Druidical superstition, and the blind obedience which it exacted from its followers, rendered the continuance of such a power inconsistent with Roman interests and Roman authority; and the mass of the Britons at that time were in too wild a state, after the overthrow of the Druids, to introduce new institutions of their own. When the Druids were once overthrown, it followed, in the natural course of things, that a people subdued in this unusual manner should pass under the immediate jurisdiction of the Romans.§

The Roman supremacy in Britain lasted about three hundred and sixty years after the time of Claudius, until the year

\* De Morte Claudii, VII. 5; XIII. 2.

† Agri. cap. 21. Hortari privatim, adjuvare publice, ut templa; fora, domus exstruerent \* \* \* Jam vera principum filios liberalibus artibus erudire. \* \* \* Inde etiam habitus nostri honor, et frequens toga: paullatimque discessum ad delinimenta vitorum, porticus et balnea et conviviorum elegantiam.

‡ See Rein in Pauly's Realencyclopædie.

§ Comp. Spelmann, Dissertatio ad Fletam cap. IV, vol. II. p. 1057 (ed. Wilkins, London, 1826), Duck; De Usu et Auctoritate Juris Civilis Romanorum. Lib. II. par. secund. (Leipsic, 1686).



in which Rome was taken by Alaric.\* Hard pressed at home, the Romans were not in a condition to protect the province from the inroads of the Picts and Scots. The "groans of the Britons" were without avail, and that freedom from the Roman yoke which they had once so earnestly longed for, was at length forced upon them.

We have no direct means of proving in what manner the government of Britain, if any there was, was carried on after the departure of the Romans. It is supposed, however, that powerful Britons in different parts of the Island established a number of petty independent kingdoms which lasted until the inroad of the Saxons.† But until that event nothing transpired to change, in any great measure, the habits and institutions of the people. On the whole, we are justified in concluding that Britain at this period had become thoroughly Romanized, and that the aborigines had become freely imbued with the civilization and institutions of the mother country.

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\* Selden Lib. II. p. 1057.

† Hume, History of England. Vol. I, p. 19.

*III. SOME REMARKS ON EXECUTORY DEVICES.*

Chancellor Kent says, "An executory devise is a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law;" and then adds, "if the limitation by will does not depart from those rules prescribed for the government of contingent remainders, it is, in that case, a contingent remainder, and not an executory devise."\* This latter proposition is certainly true, unless a contingent remainder by will, and an executory devise be held the same thing, which they are not. But the first proposition, though marking one of the incidents and distinguishing aspects of an executory devise, as differing from a contingent remainder, can not be held to have the requisites of a definition of such contingent estates. It only serves to point out a divergence or antagonism in the elements of the two estates, but gives no idea of what the estate proposed to be defined is, or what are its affirmative characteristics.

Sir William Blackstone† gives a definition and accurate description of an executory devise, as far as it goes, but not full, as it fails to embody an essential element of such estates, without which it is void, that is, the time fixed by the law in which the contingency must happen, on which the estate shall take effect. It is true that both Chancellor Kent and Blackstone, go on, the one to give very fully the doctrine on this subject, the other to state that the "contingencies *ought* to be such as may happen within a reasonable time; as within one or more lives in being, or within a moderate term of years"—owing to the abhorrence of a perpetuity by the courts. These further statements of the rules of law on the subject by the two great jurists we have cited, however, do not relieve their definitions, as such, from liability to criticism

\* Vol. 4, p. 297.

† Book 2, p. 173.

as essentially defective, but rather serve to point out the want we have indicated.

It would seem from the statement of the doctrine by Blackstone, that it was hardly considered by him as definitely settled, so far as the period when the contingency must happen, when his lectures were delivered, or when published in 1765, and the four succeeding years. He says, "The utmost length that has hitherto been allowed for the contingency of an executory devise of either kind (such as he had stated) to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a *femme covert*, as shall first attain the age of twenty-one years, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother, and subsequent infancy of her son; and this hath been decreed to be a good executory devise." Mr. Justice Buller, however, in the great case of *Thelluson v. Woodford*,\* decided in 1799, states the rule to have been long settled, with all its limitations. His language is as follows: "Whether our predecessors acted wisely or unwisely in the time they took in adopting the rules as to executory devise, is not now the question; for the rule allowing any number of lives in being a reasonable time for gestation, and twenty-one years, is now the clear law that has been settled and followed for ages; and we can not shake that rule without shaking the foundation of the law." "This mode of limitation," he adds, "is more in use than conveyance by common law feoffment; it is to be favored, because it assists men in the disposition of their property, and in providing for their relations better than they can otherwise do."

As a matter of curiosity, an enquiry into the origin of the rule may be the amusement of a leisure hour, but it will not afford any assistance in the decision of a court of justice. We may remark that from the cases cited, and the learning presented in the arguments of the eminent lawyers who argued the above case, Buller was correct, and we may be permitted to say, that on such a question he is higher authority than

\* 4 Vesey, 319.

Blackstone, and was his superior in accurate knowledge of the law of England on questions of the kind.

It would seem from the language of Ch. Baron McDonald, as well as that of Lord Eldon, in delivering their opinions in the House of Lords on the hearing of the case of *Thelluson v. Woodford*, on appeal,<sup>†</sup> that there may possibly arise a case in which another element may be introduced to defeat the limitation, not based on the question of time alone, in which the estate should vest, but on the idea of the difficulty of ascertaining the fact of the extinction of the lives described. The Chief Baron says, in answer to the question put, "Shall lands be rendered unalienable during the lives of all the individuals, who compose very large societies or bodies of men, or where other very extensive descriptions are made use of?" "it may be answered, that when such cases occur, they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described, and it will be supported or avoided accordingly." Lord Eldon, p. 146, says "The language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, *not exceeding that to which testimony can be applied to determine when the survivor of them drops.*" We are aware of no case in which this question, however, has been presented, nor do we well see how the principle announced could be reduced to anything like precision as a rule of property. How many lives should be held to raise the difficulty suggested, or how numerous the body of men should be, during whose lives the estate should remain unalienable, in order to meet the requirements of the suggestion of the learned Chief Baron, would be a difficult question to determine and fix with the certainty proper for a rule of law.

Passing from these questions, we present a few cases illustrative of the rules on the subject, that we may gather with some distinctness its proper application, and more distinctly apprehend the rule itself.

<sup>†</sup> 11 Vesey, 136 and 146.

In the great case of *Thelluson v. Woodford* as reported in 11th Vesey, on appeal to the House of Lords, the case on the will was stated as follows: "A testator, by his will, being seized in fee of the real estate therein mentioned, made the following devise: 'I give and devise all my manors, messuages, tenements and hereditaments at Brodsworth, in the county of York, after the death of my sons, Peter Isaac Thelluson, George Woodford Thelluson, and Charles Thelluson, and of my grandson, John Thelluson, son of my son, Peter Isaac Thelluson, and of such other sons as my said son Peter Isaac Thelluson may have, and of such other sons as my sons George Woodford Thelluson, and Charles Thelluson may have, and of such issue as my sons may have as shall be living at the time of my decease, or born in due time afterwards, and after the deaths of the survivors and survivor of the several persons aforesaid, to *such* person as at the time of the death of the survivor of the said several persons shall then be the eldest male lineal descendant of my son Peter Isaac Thelluson, and his heirs forever.' At the death of the testator there were seven persons actually born answering the description mentioned in the will, and two *in ventre sa mere*, who would answer the description, if an unborn child could do so." The questions submitted for decision were two: First, all the said several persons being dead, there being living one male lineal descendant of Peter Isaac Thelluson, is such person entitled by law, under the devise to the said manors, etc., etc.? Second, if at the death of the survivor of the several persons named, such only male lineal descendant was not actually born, but was *in ventre sa mere*, would such lineal descendant, when actually born, take? It was unanimously held in the affirmative on both propositions. The Chief Baron, in delivering the opinion of the judges, said, the subject of the number of lives in being on the falling in of which the estate was to vest, had been considered by the ablest judges, "who had for a great length of time expressed themselves, not merely without any qualification or circumscription, but have treated the number of lives a matter of no moment;" the ground of that opinion being, that no public inconveni-

ence could arise from suspending the vesting of the estate during any one life, and that, in fact, the life of the survivor of many persons named or described is but the life of some one person. He, however, as a matter perhaps of caution, adds, "This must be understood to mean any number of lives, the extinction of which could be proved without difficulty." As we have said, however, no case, we believe, has been adjudged in which this qualification has been applied, and the principle thus stated must be considered as *obiter*, and not a settled rule, until so adjudged.

The result of the cases up to that period is thus given by the Chief Baron, in the language of Lord Chief Justice Willes: "Executory devises have not been considered as mere possibilities, but as certain interests and estates; and have been resembled to contingent remainders in all other respects, only they have been put under some restraints to prevent perpetuities. As at first it was held, that the contingency must happen within the compass of a life or lives in being, or a reasonable number of years; at length it was extended a little further, namely, to a child *in ventre sa mere* at the time of the death of the father; because, as that contingency must necessarily happen within less than nine months after the death of a person in being, that construction would introduce no inconvenience, and the rule has been extended to twenty-one years after the death of a person in being; as in that case likewise there is no danger of a perpetuity." The learned Chief Baron, then adds, that "the testator in the case before the court, under the above rule, had not postponed the vesting of the estate, even so long as he might have done." Under the rule above stated, which may now be considered as definitely settled, it is clear the testator might have postponed the period for vesting the estate in the devisee, not only during the life, or until after the death of the parties named, to wit, his sons, his grandson, and their sons, and such issue as said sons might have as should be living at his decease, or born in due time afterwards, that is, such as might be *in ventre sa mere* at his death, but to the period of twenty-one years after the death of any one of the persons named, as in being at his

death, and a fraction of a year after this, so as to meet the case of a child unborn at that period, to-wit, the death of the person in being, on whose death the limitation was to take effect. This rule was laid down, says Chancellor Kent,\* in 1736, by the Kings Bench, in the case of *Stephens v. Stephens*. "Since that period," he adds, "an executory devise of the inheritance to the extent of a life or lives in being, and twenty-one years, and the fraction of another year to reach the case of a posthumous child, has been uniformly allowed, and the same rule equally applies to chattel interests."

Having ascertained the rule with its limitations, we now proceed briefly to an examination of the reason of it. The period fixed on, though apparently arbitrary, in fact is not so, but is based on a settled legal analogy found in the English law at the time, in the limitation of contingent remainders by conveyance. In such conveyances the remainder took effect on the falling in of the precedent estate, which supported it. This remainder-man might be a child *in ventre sa mere*. In the ordinary case where the remainder-man was in existence at the happening of the contingency, the estate could not be unalienably longer than the period of his majority. At that period, however strict the entail, he could by suffering a recovery, or levying a fine bar the entail, and convey an absolute title to the estate, free from all limitations imposed on it. If unborn, the additional period of gestation added to the twenty-one years, would enable him to do the same thing. In strict analogy to this period, and the ability of the remainder-man to unfetter the estate after the time mentioned, the rule was ultimately established fixing the period when the estate should vest in cases of executory devise. The period thus established, as we have said, has been, we believe, uniformly adopted, and is now one of the stable rules of property, not likely to be departed from or overturned by any court recognizing the common law as the basis or source of the jurisprudence it administers. We close with a mere statement, without citing illustrations, of the familiar distinguishing features between a remainder and

\* Vol. 4, p. 301.

an executory devise. First, the latter needs not any particular estate to support it; a remainder always does. Second, a fee may be limited on a fee. This can not be in the case of a remainder. Third, a term for years may be limited over after a life estate created in the same. "At law the grant of the term to a man for life, would be a total disposition of the whole term."\*

Such is a brief summary of the leading doctrines of this question—not difficult, it is true, in themselves, but which, in their application by the courts, have given rise to as much discussion and decision as perhaps any other branch of our law.

THOMAS J. FREEMAN.

TRENTON, TENN.

\* 4 Kent, p. 303.



#### *IV. THE RIGHT OF RAILWAY PASSENGERS TO SUITABLE ACCOMMODATIONS.*

Although the volumes of reports, both in England and America, contain many cases which define with more or less certainty, most of the several rights and duties of inland passenger carriers and their patrons; the number of adjudications respecting the particular duty on the part of the carrier to provide, and the right of the passenger to demand and enjoy, proper and suitable accommodations while the carriage is being performed, is so small as to almost entirely fail in establishing any distinct and settled rule upon the subject.

It is, therefore, believed that a brief consideration of the condition of this branch of the law of carriers, and a careful examination of the very few and meager authorities which are to be found in the books, will, perhaps, prove not unprofitable at this time when railways, whether using steam power on long routes, or horse-power on city streets, are constantly becoming more and more inadequate to the accommodation of the travel which they have invited and undertaken to provide for, and for the securing of which there existed formerly a much more healthy and legitimate competition than at present.

In order the more methodically to approach the subject under consideration, we may assume as a fundamental and well-established principle, that public carriers of persons, although not burthened with the same degree of responsibility for the safety of their passengers as are carriers of goods in respect to their freight; yet they are bound equally in extent, and in the same manner, if not by the common law, at least by the contract which is implied, by their holding themselves out as public carriers, to receive and carry, under certain natural and reasonable restrictions, all who may apply to them for transportation, and by the acceptance

of their terms on the part of those becoming passengers.\*

Some of the restrictions noted as qualifying the proposition just stated, are, that the person who offers himself as a passenger must be in a fit state to be carried; that he must conduct himself properly; that he must pay, or offer to pay the regular and reasonable fare, and submit to all reasonable regulations imposed by the carrier for the comfort and safety of the passengers, and the proper conduct of the business. The person desirous of being carried becomes a passenger as soon as any assent is given to his request, and the carrier will be responsible for turning a passenger out after having received his fare and admitted him as a passenger, if he has not been guilty of misconduct during the journey.\*\* The restriction, however, with which we now have most to do, is, *that there be sufficient room in the carrier's vehicle.*† This modification, or restriction, seems to have been itself modified or qualified, and we find that not only must the carrier provide accommodations according to any special contract he may have made with the passenger,‡ and according to such special regulations as may be prescribed by statute; but he can not be excused from the duty to carry on the ground that there is no room in his vehicle, unless he has especially limited his obligation by contracting to carry only on con-

\*\* 1 Chitty Car. § 243; Brotherton v. Wood, 3 Bro. & B. 54; Story Bailm., § 591; Weed v. Panama R. R., 17 N. Y. 362; Jencks v. Coleman, 2 Sumn. 221; Ansell v. Waterhouse, 2 Chitty, 1; Tarbell v. Central Pacific R. R., 34 Cal. 616; Bennett v. Dalton, 10 N. H. 481; 2 Redf. Railw., § 198; Hollister v. Nowlen, 19 Wend. 239; Galena & Chi. R. R. v. Yarwood, 15 Ill. 472; Tattan v. Great W. Railw., 2 El. & El. 844; Cole v. Goodwin, 19 Wend. 251; Angell Car., § 524-5; Beekman v. Schenectady R. R., 3 Paige Ch. 45.

\* Chitty Car. § 246; Story Bailm., § 591; 2 Redf. Railw., § 198; Angell Car. § 525; Day v. Owen, 5 Mich. 520; Pearson v. Duane, 4 Wall. 605; Austin v. Great W. Railw., Law Rep. 2 Q. B. 442; Buffitt v. Troy, 36 Barb. 420.

† Story Bailm., § 594; Long v. Horne, 1 C. & P. 612; Bennett v. Dalton, 10 N. H. 481; Hawcroft v. Great N. Railw. 21 L. J. Q. B. 178; Angell Car., § 525.

‡ Long v. Horne, cited *supra*; Devoort v. Loomer, 21 Conn. 245; Angell Car., § 528; Story Bailm., § 597; Willis v. Long Island R. R., 32 Barb. 398, 34 N. Y. 670.

dition of there being room.\* And the carrier must insist upon his excuse for not carrying, if he have one, at the time the transportation is applied for. If he receives the passenger without so doing, his liability is the same as though no ground for refusal existed.†

Going back to the text-books, we find in Chitty the following: "It appears reasonable that railway companies should always be bound to carry, and to make accommodation according to, and sufficient for the demand, for their means of conveyance are capable of extension by the addition of extra carriages, and they should be bound to add them to the fullest extent, or even to form another train."‡ This author, more than any other, seems to have viewed the subject in a clear light; but owing possibly to the existence of the detailed system of statutory supervision and regulation of the business existing in England, there would seem to have been no adjudications for him to cite in support of his position. So far as the ordinary exigencies of passenger transportation required at that time, the means of providing for it were probably not inadequate, except upon unusual occasions; but the question as to what the rights of the parties would be, for instance, in the case of a *continuous failure* on the part of the carrier to supply proper means and accommodations for the *usual* and *ordinary* travel over his route, does not seem to have arisen in the courts, or to have occurred to his mind, or, indeed, to that of any later writer on the subject. Such a case could, perhaps, hardly have occurred in England, and it is only recently, perhaps, that it could be possible in this country, except in the case of street railways and railways running "accommodation trains," which have long been no-

\* Chitty Car., § 248; *Hawcroft v. Great N. Railw.*, cited *supra*, in which Patterson, J., held that where a railway company issued excursion tickets, stipulating to run trains in a given mode, they could not excuse themselves for not carrying all who offered, by showing that the carriages were all full. The learned judge said: "They should have made it a condition of their contract that they would not carry unless there was room." The minute statutory regulations, governing such matters, which exist in Europe, but which do not exist in America, must be kept in mind while viewing the English decisions.

† *Hannibal R. R. v. Swift*, 12 Wall. 262. ‡ § 248.

toriously delinquent in providing sufficient and proper accommodations for their patrons.

That the more modern writers upon the law of carriers have to some extent recognized the existence of the difficulties mentioned by Chitty in the extract above quoted, though it must be admitted, with little improvement upon the vague manner which the time and circumstances may excuse in him, will, perhaps, appear from the following extracts, which comprise almost all that is said by the respective authors quoted, upon this particular branch of the law.

Angell says: "It would seem upon general principles, that railway companies might excuse themselves from carrying passengers beyond their present means, if they were adequate to all ordinary occasions, and they had no reason to expect an increased press of travel at the particular time. But it should, undoubtedly, be an extreme case to justify an absolute refusal to carry a passenger, since it could scarcely be supposed ever to occur, that a railway in any sense properly equipped for the purpose of carrying passengers and freight, should not be able to meet all emergencies in some way. And if the occasion were unusual, it might excuse some discomfort in the mode of conveyance. The duty to receive persons as passengers, upon a tender of the fare, if there be sufficient room, involves the obligation that they shall not be overcrowded after they have paid their fare and taken their seats, and be thereby, as it were, expelled."\*

The author apparently proceeds upon the assumption that that there is no likelihood of a case arising where the means of transportation would prove inadequate to the demands upon it *in the ordinary course of business*; and he seems to contemplate the existence of no other than railways "properly equipped." It is true he goes on to declare generally, that the carrier is involved in the obligation to so conduct his business that the passengers shall not be overcrowded, "after they have paid their fare and taken their seats." But suppose that the means of transportation should prove inadequate, not occasionally, and in an extraordinary emergency only, but

\* § 528.

*frequently and continuously*, as is well known to be often the case on street railways and "accommodation trains;" and suppose that the passenger, after paying for his passage, and otherwise complying with all the conditions entitling him to his proper transportation, is unable to "take his seat" by reason of the number of passengers crowded into the vehicle, as is the daily experience of thousands, will the statement of the law, as made by the learned author, prove sufficient to inform us as to the rights and duties of the several parties, and the remedies applicable to the case?

Let us see what another writer says: "We are aware it is the practice in America, in almost all modes of passenger transportation, to cram the carriages to the point of suffocation almost, if passengers offer. But it is never attempted or allowed in England or on the continent. Whenever the seats in a carriage or the accommodations in a boat are all occupied, no more are allowed to enter the carriage or boat. This sometimes results in putting a first-class passenger in a second-class carriage, and *vice versa*. But no man in Europe would ever be allowed to take passage in a railway carriage without having a seat. It would be deemed the height of indiscretion, almost bordering on madness, to attempt to transport passengers by railway in a standing position; and even in omnibuses no one can enter after the seats are filled. And in Paris a prominent sign, '*Complet*,' is exposed the moment the carriage is full. And it seems to us that a passenger carrier who is supplied with sufficient accommodations for all who ordinarily offer, had better be excused from carrying any excess which might occasionally offer, than be compelled to carry at the expense of the discomfort and suffering of all the other passengers. We think, at least, if railways took this ground upon the score of safety merely, they would not fail to be sustained by the courts, unless the excited rush of all to go by the first chance, is to over-ride all other considerations, whether of safety or convenience. And we trust that public opinion here is more reasonable than to make any such demand."\*

\* 1 Redf. Railw., § 26, 5th ed. p. 100, note 18.

This note, unsatisfactory as it is, citing no authorities, and apparently not deemed of sufficient importance by the author to be embodied in the text of his great and learned work, yet contains, perhaps, the germ of what we may hope the established rule may be, as well as an indication of the means by which its establishment may be secured. The fact that nearly all the minor details of the conduct and management of railway establishments, and other means in use for the transportation of passengers, are the subjects of special and minute statutory regulation in Europe, is one of deep significance, in view of the almost total absence of such regulations in this country, which the learned author so vehemently deplores. But he seems to have narrowly escaped the same error which we have heretofore noted in Angell, of taking it for granted that the occurrence of a case of a carrier in any way incapable of, or negligent in meeting the *usual* and *ordinary* exigencies of his patronage, by the means of transportation within his control, is a contingency so remote as to be almost beyond the necessity of considering.\* In another note, which with the one above quoted, comprises almost the only mention of this question found in Redfield, the learned author reaches the very pith of the question we are discussing. But observe his treatment of it:

"It is said to have been held by some court (!) in the case of Foland v. Hudson R. R. R., that a passenger who is not provided with a seat is not obliged to pay fare, and if he is expelled from the cars for refusing such payment, may sustain an action against the company. Such a rule must require much qualification. If the passenger is not accommodated

\* In a very able article which appeared recently in the Solicitor's Journal (London) (reprinted in 2 Cent. Law Journal, 460), the still existing want of more special and definite statutory regulations on this subject, in England, is noted and commented on. And in another article from the Law Journal (London) (reprinted in 2 Cent. Law Journal, 461), the doctrine as announced by the House of Lords in a recent case, that the ticket purchased from the railway or steamboat company by the passenger does not, *per se*, constitute *the contract* for passage between them, but that such contract is an implied one, not necessarily controlled by conditions or statements endorsed or printed on the ticket, was mentioned and discussed.

in such a manner as he deems a fair compliance with the duty of the company as passenger carriers, he may decline any compromise and resort to his action against the company for refusing to carry him, as their contract by the ticket or their duty required. And he might, no doubt, sustain such action unless the company proved some just excuse. But if he chooses to accept of a passage without a seat, the general understanding (!) undoubtedly is that he must pay fare. But if he goes upon the cars expecting proper accommodations, and is put off because he declines going in that mode, he may still resort to his action."\*

It is very much to be regretted that the author failed, as he evidently did, to find the case referred to, and that a diligent search recently made by the writer, has failed to discover it. The only other case where the precise point in question seems to have been decided, is *Davis v. Kansas City, St. Joe & Council B. R. R.*,† where a passenger having purchased a ticket and entered the car, was unable to find a seat. The court held that he was not bound to surrender his ticket until a seat was provided for him. No other case appears ever to have been reported which has gone so far, and no text writer, so far as a careful search has discovered, has said as much as Mr. Redfield in the extracts quoted. And even here it is not difficult to perceive what seems to be either a remarkable want of diligence, or the traces of a still more unaccountable bias in favor of the carrier, in his treatment of this vital and hitherto almost adjudicated question. He speaks of the judgment of the court as a "rule," but hastens to deprecate any reliance upon it, as tending to establish a principle. It is true, as he says, that the passenger may, after taking the precaution to require himself to be put off, "resort to his action;" but this scarcely seems to meet the case. Of course any person who is aggrieved or injured

\* 2 Redf. Railw., § 198.

† 53 Mo. 317. In the argument of this case, as appears from the report, the counsel, whom we must presume were duly diligent, do not mention the case so loosely cited by Redfield; and the only authorities cited are those mentioned above.

may bring a suit, but the evil certainly seems to demand some more general and efficient means of prevention or redress. As soon as it seems to have been decided that a passenger has a right to refuse payment of fare, or delivery of his ticket, which is, at least, the most tangible evidence of the contract he has made with the railway company, and which contract he is entitled to show, has not been complied with, our author is in arms in defence of the carrier from such a dangerous proposition, and while insisting that such a rule "must require much qualification," gives to the injured passenger only the doubtful comfort of admitting that he has a right to "resort to his action" against the company. He goes further, and announces the principle that if the passenger consents to be carried without a seat he must still pay his fare, but the only authority given for this is "*the general understanding!*" This from one whom we have always been accustomed to regard as almost, if not quite, the highest American authority on the subject of railway carriers, is, to say the least, unsatisfactory, and it is very much to be regretted that the occasion was not improved, for a more thorough, extended, able and satisfactory discussion of the matter by one so eminently qualified to accomplish it.

Statutory provisions exist in many of the states regulating, in a general way, the transportation of passengers and freight. In Tennessee the law provides that no railway company shall discriminate, in the establishment of freight tariffs, for or against any particular town, city or community; and also that the name of each station, and the time of stoppage thereat, shall be called distinctly through the carriages of each passenger train. And suits to recover the penalties imposed for violations of the law have been brought, amounting in the aggregate to hundreds of thousands of dollars. In Iowa, a statute regulating the rates of fare to be charged by railway companies, has been recently sustained by the United States Circuit Court.\* And in other states, what is called "Granger legislation," concerning railway lines, mostly of a vindictive

\* C. B. & Q. R. R. v. Attorney-General of Iowa, 2 Cent. Law Journal, 335.



and impracticable character, has recently prevailed, with varying success. But there exists no such system of supervision and control over public carriers of goods and passengers, by statutory regulations, minute in detail, just and unoppressive in effect, and general in their application, as have been noted and commented on as existing in Europe. It may be said that in America so different a state of things exists; the necessity for such a detailed system seems so slight; the great disparity between the number and volume of business of carriers, and the territory and population to be affected thereby, is so apparent, that no practical application of such a system could be made. But it should not be forgotten that when evils unmistakably exist, and injuries frequently occur, and occasions almost daily arise demonstrating the necessity of a competent remedy for such evils, the time has assuredly come for the adoption and application of such remedy.

That a competent remedy is imperatively needed for the evil we are considering, seems scarcely to call for illustration, but before passing to a consideration of the remedy, it may be well to recapitulate briefly what has been said, and, perhaps, note one or two familiar illustrations of the evils under consideration.

We find that the carrier of passengers is bound to carry all who offer, upon certain conditions, one of which is that there is room for all in his vehicle; that if there is not room, he is neither allowed or required to refuse passage to any, but may, according to custom, and in the absence of any law to the contrary, crowd in all who will consent to be so carried, no matter how great the inconvenience or danger to those who have or have not been able to secure seats. Whether the carrier refuses to carry for want of room in the vehicle, or follows the custom and refuses none, he is not liable to the state or community for a general offence, nor to any person definitely, for his failure to perform his contract or his duty as a public carrier; but the injured person is obliged to resort in each individual case and instance, to his special action, in order to receive satisfaction for the injury sustained; as if, instead of laws prescribing the punishment of individuals for

misdeameanors committed against the peace and well-being of the community, each person injured by the commission of such offences, should be relegated to his personal action against the offender, for the recovery of the actual damage sustained in each individual case. The carrier having held himself out to the public as ready and able to carry all who may contract with him for passage, by the purchase of his tickets or otherwise; and the passenger having paid for his passage by such purchase, nothing remains but for the carrier to perform his part of the contract. The passenger proceeds to the conveyance in the reasonable expectation of being provided with suitable means for performing the transit. Ordinarily, perhaps, though not, as is apparent, invariably, if the journey is to be performed on a line of railway extending over a long distance, the difficulty of procuring a suitable and comfortable place in which to remain while the transit is being performed, is not often very great as yet in this country. But the occasions when such difficulty arises are not only becoming more frequent, as population and travel increase, and the means of transportation become less capable of meeting the increasing demands upon them; but the tendency of the time has been to indulge such corporations, because, perhaps, of the vast service they perform in promoting the advance of civilization in a new and growing country, in an almost unchecked liberty of manner in their dealings with and relations to the public.

The person applying for passage, is, as we have seen,\* a passenger *de facto*, as soon as any assent to his proposal to become such is given. Such assent may, doubtless, be inferred from the sale to him of his ticket by the carrier. Having thus become a passenger he enters the carriage only to find that he must either perform his journey in an uncomfortable and dangerous position, or decline to proceed under such conditions and defer his intended journey to another opportunity, perhaps at great loss, and certainly at great inconvenience. We are told, and doubtless much authority exists for it, that the passenger in such a case can resort to his

\* Chitty Car., § 245. See also Hannibal R. R. v. Swift, 12 Wall. 262.

action for damages actually sustained by reason of the failure of the carrier to transport him ; but the object of our discussion being the general good of the whole public, rather than the particular remedy applicable to individual cases, it seems evident that such a remedy is quite as inadequate to cure the evil, as are the means of transportation on some of our modern railway lines to accommodate their usual and ordinary travel, and meet the reasonable demands of the public.

In order to more fully illustrate the sort of compliance with the contract for transportation which the carrier too generally indulges in, and with which the passenger is too often obliged to content himself, let us examine one or two of the most familiar and frequently occurring instances, which will, at least, demonstrate the necessity of some competent remedy for the evil, if they do not, in fact, suggest its form and application.

A railroad company on some *quasi* "special occasion," during the St. Louis Fair, for instance, advertises to sell "round-trip tickets" to the city and return, to be used upon what are called "excursion trains." Several years' experience has demonstrated almost the exact number of persons who will be likely to avail themselves of such an opportunity. Notwithstanding such experience, the company fails to provide a sufficient number of carriages to transport all who offer to become passengers, and inconvenience, perhaps injury more serious, occurs. Now this is in one sense an "unusual occasion," with respect to which the carrier under ordinary circumstances, and, *if unexpected by him*, might be excused for a failure to supply the required means and proper accommodations. But really it is a case where, from long experience, he is enabled to judge with a considerable degree of certainty, of the necessities of the occasion and to provide accordingly. If he does not do so, and damage results from his failure, is he to be permitted, after having held himself out to the public, without restriction or qualification, as prepared to carry *all* who might offer to accept his terms, to shield himself from responsibility for injuries caused by a failure to perform his contract, under the plea of an "unusual occasion," against which he was not

to be expected to provide? And would not a statutory regulation requiring him to provide seats for all persons who offer to accept his terms of carriage, or else lose the benefit of the proceeds of the contract, by carrying those who are without seats (if they choose to be so carried), *free of charge*, be the most speedy and effectual remedy for the evil of permitting one to contract to do that which he has no intention or expectation of performing?

The same reasoning will apply, but with much greater force, to the case of a railroad company accustomed to run "accommodation trains" over short distances, to and from the larger cities, where the means of ascertaining the exact number of persons habitually applying for transportation thereon, are quite accessible and trustworthy.

Take a more familiar and more frequently occurring illustration. On almost every line of street cars in every city where they exist, thousands of persons of all classes are to be daily transported to their business in the morning, and back to their suburban homes in the evening. There can be no excuse for a want of knowledge on the part of the railway companies, of the times of day when this tide of travel over their lines begins and ends; nor of the number requiring transportation at such particular times. And yet no resident of any city in which these cars are used, can have failed to notice the utter and constant failure of nearly every such company, to so regulate its business as to provide its patrons with proper and adequate accommodations at such times. It is idle to say that to make such provision is impracticable. The vigor with which established lines contend for "exclusive privileges," and against the establishment of rival lines, seems to preclude the existence of any ground for such an excuse. The injustice of prescribing so many strict and minute regulations by these companies, *for the collection of fares*, while leaving those who pay them to hang on by straps and door knobs, at the imminent risk of life and limb, in the desperate attempt to secure the enjoyment (!) of what they have paid for, will quickly recur to any one who has suffered in the interest of these companies; and the urgent

necessity for some adequate means of compelling, on the part of the companies, a reasonably strict performance of their contracts, is certainly no less apparent.

Now if it were provided by law that unless these carriers provide suitable and sufficient accommodations, furnishing to each passenger a seat, they shall be compelled, at the option of the passenger, to carry him free of charge, the evil would probably exist no longer than it would take time to procure a suitable number of cars and other appliances, and to so regulate their schedules as to meet the reasonable and proper demands of their patrons. If, in addition to such a wholesome law, a penalty for every such failure to perform to the utmost the reasonable requirements of the public, whether based upon contract, or upon the recognized duty of public carriers, were also imposed by law, to be sued for either by the public prosecutor, or by any person directly injured by such failure, the remedy would be still more efficient, and the health, comfort and safety of the traveling public would be fully protected and preserved. The profusion of "railroad legislation" which has been indulged in of late years, while, perhaps, effecting the settlement of many of the rights and duties of carriers and their patrons, seems yet to have failed in providing against the great and growing evil we are considering. And the public, the people, for whose benefit and convenience lines of transportation are supposed to be established, have the right to demand that, having paid the taxes which provide for the liquidation of the vast amounts of "railway aid bonds" with which so many roads are built; having purchased their tickets in good faith, and otherwise complied with all proper and reasonable regulations prescribed by the carriers, or by law, for the conduct of the business in a safe and proper manner, they shall be enabled to enjoy, without danger or discomfort, that for which they have paid, and which the carriers have undertaken to supply. The decisions of courts in actions for damage in individual cases, no matter how frequent or severe, will hardly meet the case. But legislation, such as is said to obtain with such excellent results in Europe, uniform, yet minute in detail, and imposing no

unreasonable requirements upon the carrier, appears to be the only proper and adequate remedy for securing the rights of the passenger, and distinctly and permanently defining the duties of the carrier. Such a system of distinct and minute regulations can not be objected to as an unwarrantable innovation. The laws of the United States governing the transportation of passengers and goods upon the navigable waters which are under their control, are tolerably minute and specific, much more so than any state law respecting carriage by land; yet they have never been considered oppressive. And the rules governing the liability for goods carried by land or water, are much more severe than would be required to meet the exigencies of the case with respect to the carriage of persons.

If the attention of the legislative assemblies of the several states could be earnestly directed to the examination of the European systems of laws and regulations as to carriers of passengers, so that the growing need of some such system in this country might become apparent, a great and lasting good, no less to the carrier than to the public, might be effected. And if this paper shall have contributed towards directing the attention of wise and thoughtful men to the subject, its object will have been fully accomplished.

CHAS. A. CHOATE.

ST. LOUIS, MO.

## V. NOTES ON CODE PLEADING.

I have heretofore furnished for the *Central Law Journal*, a few notes upon pleading, as modified in thirteen states, by adopting the general provisions of the New York code, which notes were made in aid of lectures at the Missouri State University law school. At the request of its editor, I furnish a few more for the REVIEW, yet I do it with some reluctance, because of their elementary character. It is not, I suppose, the design of this periodical to teach elementary law, but rather to furnish a medium for the discussion of new and difficult questions, to enable its readers to keep up with our jurisprudence, and to aid the growth of a legal literature. But perhaps its readers, and especially those who are young, will not wholly lose their time by calling to mind some of the elementary principles upon this important subject. I am sometimes painfully impressed with the loose notions, almost the absence of any notion, in regard to it, and by some who would be otherwise pretty good lawyers. The New York code, properly understood, so far from detroying the science of pleading, makes it more scientific. All that was substantial is preserved; fictions and formalities are alone abolished. Pleadings are made far more logical, and better secure their great end—an end very often not reached before—the exhibition upon paper of the facts constituting the cause of action and the defense. The code provisions, in modifying its artificial features, render the study more philosophical, and more closely hinge it to the law of remedy.

I should add that, under rule 3, I have discussed questions upon which there is much discord in the rulings.

In the statement of facts in the petition, some things must be made to appear in addition to the specific injury, or the agreement and the breach complained of, before a liability is shown. Though they surround, as it were, and aid the main charge, and

are often but matter of inducement, yet they must be shown, and the omission of a statement in regard to them, would render the pleading demurrable as not stating facts sufficient to constitute a cause of action. In this respect the rules showing what facts must be stated, differ from those showing what need not be stated, and from those pertaining to the manner of statement, as the rules coming under the two latter heads are usually enforced by motion. I will give in this article only three of the former class of rules:

RULE I. THE PETITION MUST SHOW TITLE.

§ 1. *Definition of Title, and Divisions of Subject.*—Mr. Stephen says: "When, in pleading, any right or authority is set up in respect of property, real or personal, some title in that property must be alleged in the party, or in some other person from whom he derives his authority. So, if a person be charged with any liability in respect of property, real or personal, his title to that property must be alleged."\*

The term title is sometimes used in the more comprehensive sense of right of action,† but it is here considered in the sense of ownership, or interest in the property or contract in respect to which the suit is brought. The rule only applies to causes where the plaintiff's right depends upon such interest; and I will consider, 1. Title to real property; 2. Title to personal property, and 3. Title to choses in action.

§ 2. *1. Title to Real Property, and first, in Real Actions.*—In the old writ of right, the land was described as the inheritance of the plaintiff. In the common law action of ejectment the pleading does not show the title of the plaintiff's lessor, who was the real plaintiff, and this arises from the form of the action. It is not necessary to allege the title of a lessor, as between him and his lessee, for the latter is estopped from denying it; but the fictitious title of the lessee, the nominal plaintiff, is alleged to come through a demise, and this title is expressly acknowledged by the tenant in possession when admitted to defend in place of the casual ejector. Thus the real title of the real plaintiff does not appear, but that of the nominal plaintiff, although fictitious, is abundantly

\* Stephen's Pl., Heard's ed. \* 304.

† Gould, iv. 8.



shown. The form of the action is trespass, and if damages for the ouster were alone sought, prior possession would have been sufficient; but the plaintiff seeks to be restored to his term as well; hence it must be described.

§ 3. *Continued—Statutory Real Actions.*—In the statutory actions for the recovery of real property provided in some of the states, if the pleadings were not controlled by the statute itself, but were left to be governed by general principles, it would be necessary for the plaintiff to show his title, that is, the facts that give him the right of possession. If he has such a right, it is because of some facts, as that he is the owner in fee, or of a term, or of some other interest carrying the possession, or that he had prior possession and was unlawfully dispossessed. In some of the states they are so left, and in some the statute recognizes the duty of thus showing title, or expressly requires it, but in others, the spirit of the old fictitious action still controls the proceeding, a uniform formula is permitted in all cases, without reference to the peculiar facts of each, and the obligation to show title, and the true one, is ignored.

§ 4. *Continued—Statutory Actions in Missouri, Ohio, Kansas and Nebraska.*—In Missouri it is sufficient to allege that the plaintiff "was entitled to the possession of the premises,"\*

\* W. S. 559, § 6. In the St. Louis circuit, the defect in the pleading is sought to be remedied by the following rule of court: "In all actions of ejectment, each party shall, on or before the day of trial, make out and deliver to the judge at 'special term' an abstract of his title, which abstract shall state the derivation of the title, parties to each deed, dates of execution, acknowledgment and recording and the tract of land conveyed. If either party fail to file such abstract, the cause shall, on motion of the opposite party, be continued; but if no motion is made for a continuance by the opposite party, then the cause shall be tried or continued at the discretion of the court." The object of this rule seems to be to furnish information to the court. This is well; but to fully supply the parties with information in regard to the title of their opponent, the abstract should be filed with the pleading, or furnished to the opposite party.

The fictitious action was abolished in Missouri in 1825, and the present form of the petition is substantially the one then provided for, although the act concerning ejectment was greatly improved in the revi-

etc.; in Ohio and Nebraska, that the plaintiff "has a legal estate" in the premises,\* and in Kansas, that he "has a legal or equitable estate" in them.† Neither of these formulas contains an allegation of fact in regard to title, and, at least in Missouri, the statement is a mere conclusion of law.

The statement allowed in Ohio, Nebraska and Kansas, has the appearance of showing title, but shows it so indefinitely as to violate another rule, to-wit: that facts should be stated with certainty.

§ 5. *Continued—Statutory Action in New York.*—The code of New York‡ affirms the provisions of the revised statutes in regard to real actions, and by those statutes,§ it is made sufficient for the plaintiff to aver in his declaration (complaint) that on some day therein to be specified, and which must be after his title accrued, he was possessed of the premises in question, describing them with convenient certainty, etc., etc. If the action be brought for the recovery of dower (as it may be in New York), the complaint must state that the plaintiff was possessed of an undivided third part as her reasonable dower as widow of her husband, naming him. In every other case the plaintiff must state whether he claims in fee, or whether he claims for his own life or the life of another, or for a term of years, specifying such lives or the duration of such term.|| Thus, in addition to the fact of prior possession, the plaintiff must show title. So far as the revised statutes required an allegation of prior possession, they are held to be modified by the code, when there was, in fact, no such possession, as, when a purchaser upon execution sale seeks to turn out the sion of 1835. This departure from principle in authorizing a conclusion of law to be stated instead of an issuable fact, was necessarily followed by a similar departure in the traverse, which is but a denial of such conclusion, and, as the petition admits evidence of any fact tending to establish the right of possession, the denial admits any evidence going to disprove such right. Thus the pleadings give notice of nothing but the property in controversy. It was, doubtless, considered an improvement upon the common law action, but it fails to conform to the principles of pleading as applied to other actions, and its retention since the adoption of the code greatly disturbs the harmony of the system.

\* Ohio, § 558; Neb. § 626.

† Kans. Code, § 595.

‡ § 455.

§ 2 Stat. at Large, p. 312, § 7.

|| Id. § 10.

execution debtor. The code abolishes fictions and forms, and nothing should be alleged not necessary to be proved. The revised statutes, while requiring the allegation of prior possession, dispensed with the necessity of proving it,\* if the plaintiff had never been in possession; but now, in such case, he should not allege it, but it is sufficient for him to state his title, as that he is the owner in fee simple and that defendant is in possession and unlawfully withholds, etc.† It will not, however, suffice to say, that the premises were conveyed to the plaintiff by warranty deed, and that he became seized by a *lawful title*, etc.‡ Whether it was lawful or not is a question of law, and the true title should be given.

The provisions of the New York revised statutes in regard to pleading in this action have been substantially adopted in several states where the system of code pleading does not prevail, as Michigan,§ Illinois,|| Colorado.¶

§ 6. *Continued—Statutory Action in Indiana, Wisconsin, Iowa and Oregon.*—Most of the states adopting the new system, provide in the code itself, that the plaintiff shall set out his title. In Indiana he is required to state that he is entitled to the possession of the premises, and the interest he claims therein.\*\* Also, the court on motion may order abstracts of title to be furnished.†† Under this a statutory form is given, to wit: "A. B. states that he is the owner in fee simple (or for life, etc.), and entitled to the possession, etc."‡‡ The Wisconsin statute requires the plaintiff to state particularly the nature and extent of his estate or interest, whether in fee, in dower, for life or a term of years, specifying such life or lives, or duration of such term, and that he is entitled to the possession, etc.§§ In Iowa, the petition may state generally that the plaintiff is entitled to the possession of the premises, particularly describing them, also the quantity of his estate and the extent of his interest therein, but the plaintiff must attach to

\* Id. § 25.

† *Ensign v. Sherman*, 14 How. Pr. 429.

‡ *Lawrence v. Wright*, 2 Duer, 673.

§ 2 Comp. Laws of 1871, ch. 195, § 7-10.

|| Rev. S. of 1874, p. 444, §§ 11, 13.

¶ R. S. 1868, ch. 27, §§ 7, 8.

\*\* Ind. Code, § 595. †† Id. § 79. ‡‡ Id. p. 378. §§ Ch. 141, § 5.

his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the page and book where the same appears of record, must also furnish a copy of any unrecorded conveyance upon which he relies, and the facts relied upon to sustain a title by parol. No written evidence shall be introduced at the trial unless it has been sufficiently referred to in the abstract.\* In Oregon the plaintiff must set forth in his complaint the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, and the duration of such term, and that he is entitled to the possession thereof, etc.†

§ 7. *Continued*—*The States of Kentucky, Arkansas, California, Nevada and Minnesota*—which have adopted the new system, make no special provision for pleadings in actions for the possession of real property, but leave them to be governed by the general principles of pleading. In few of them, it is believed, would a petition or complaint be held good, that failed to show as a fact the title of the claimant. In Kentucky, however, a form of pleading title was reported by the commissioners, is appended to the code, and treated as sufficient,‡ which only states that the plaintiff is the owner of the premises and is entitled to the possession. In California it is held§ that a complaint pleading title in general terms, as “that the said plaintiffs are the owners in fee as tenants in common, and have the lawful right, and are entitled to possession,” is good on demurrer, Justice Field saying, “it is sufficient, therefore, in a complaint in ejectment, for the plaintiff to aver, in respect to his title, that he is seized of the premises, or of some estate therein, in fee, or for life, or for years, according to the fact.”

§ 8. *Title to the Realty in other Actions*.—There are various other actions for enforcing rights, or redressing wrongs in respect to real property, involving, or dispensing with the obligation to plead title: in trespass it is not necessary, for

\* Iowa code of 1873, §§ 3250, 3251.

† Code, § 315.

‡ Newman's Ky. Pl., 297.

§ Payne v. Treadwell, 16 Cal. 220.

the defendant is a wrong-doer, invading the plaintiff's possession, and the plaintiff will recover, whatever may be his title, unless the defendant shall plead *liberum tenementum*, and thus raise the issue. But in an *avowry* where the plaintiff has replevied cattle distrained *damage feasant*, the defendant, who would justify the seizure of another's property, must plead every fact that would authorize it. He must show his title to the premises upon which they were found trespassing,\* or, if the distress be of cattle trespassing upon a common, he must show his title to the land in respect to which he claims a right in common.†

The common law right to distrain *damage feasant* is denied in some of the states, and in New York, Wisconsin, Oregon and Minnesota, the obligation to plead title is modified by providing,‡ that, in an action to recover the possession of property distrained doing damage, an answer that the defendant, or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good, without setting forth the title to such real property.

§ 9. *Title in Actions Founded on Leases.*—Premising that the landlord, in an action against his lessee, need not allege title, inasmuch as the tenant is estopped from disputing it, the circumstances under which, in an action upon a lease it becomes necessary, are thus stated by Chitty.§ “In an action on a lease at the suit of the assignee of the reversion, or of the heir of the lessor, or by an executor of a termor, for rent which became due after the death of the testator, the declaration must state the title of the lessor to the demised premises, in order that it may appear that he had such an estate in the reversion as might be legally vested in the plaintiff in the character in which he sues, and legally entitle him to recover the damages claimed in respect of the breaches of the covenant.” And this distinction is sound, for the tenant has only

\* 3 Chitty Pl., 1058, note *f* & *g*.

† Id. 1059, note *m*.

‡ N. Y. § 166; Minn. § 102; Wis. ch. 125, § 30; Oregon, § 90.

§ 1 Pl., 363.

acknowledged the title of the lessor and his right to sue; but in order to determine whether his assignee or representative succeeded to his right, it would become material to enquire into the nature of the original estate, as well as his relation to it.\* And if one sues as heir, he must show how he is heir, as well as the nature of the estate; otherwise he fails to set out his title;† he does not show the facts that constitute it, and simply to say that he is heir, is but an averment of a legal conclusion. And the assignee must show the assignment, and the executor or administrator, the facts establishing his representative character.

§ 10. *When Title need not be Shown.*—Some of the exceptions to the rule requiring the plaintiff to set out his title to the property in respect to which his right of action has accrued, have been alluded to. Thus, the statutes of some of the states dispense with the necessity in the action to recover real property, where we should suppose it would, upon principle, be imperative. In an action upon a lease for rent between the landlord and his lessee, or for other breach of its conditions, the suit is upon the contract and the title is not involved. Indeed, so long as the tenant is in under him, it can not be put in issue. It is sufficient, therefore, to set out the lease without showing the lessor's right to make it. Also in trespass *quare clausum*, possession being all that is necessary to authorize the action, it is sufficient to describe the premises in general terms as the property of the plaintiff, or to say that he was lawfully possessed as of a dwelling house or field, provided a wrongful entry is charged.

§ 11. 2. *Title to Personal Property—General Allegation Sufficient.*—If the suit be in respect to personal property, the necessity of showing title or otherwise, depends upon the same general principles; the different character, however, of its title greatly modifying the application of the rule. The heir, as such, has nothing to do with it. As distributee, or as being interested in the payment of debts, he may compel the executor or admin-

\* See precedents in 2 Chitty Pl. 560, *et seq.*

† Wadsworth v. Wadsworth, 2 Ohio, 333; 2 Saund. 45e. n.; Id. 7e. in n. 4; 1 Chitty Pl., 368; Stephen Pl., 310.

istrator to account for all the personalty of the ancestor, but he derives no title by descent to specific property. Neither do the feudal terms *tenure* and *estate* apply to his interest, and it is sufficient in describing his title to say that he was the owner of, or was in possession of, or that he was in possession as owner, or as bailee, etc.; and, perhaps, as under the old system, a general allegation of property would be sustained, although the evidence should show only a special property.\* In common law pleading the usual mode of alleging title in chattels was by following a description of the property with the words, "of the said plaintiff," whether the injury was direct or consequential, except in trover, where there was an allegation that the plaintiff "was lawfully possessed as of his own property of, etc.," to be followed by the fictitious statement of the loss and finding.† The difference in the phraseology arose from the fact that in order to maintain trover, the plaintiff must have a property in the chattel, either general or special,‡ while in other actions actual possession was sufficient, or constructive possession with a general or special property.§ The words "of the said plaintiff" covered any interest that would enable him to maintain the action.

§ 12. *Difference between Trespass and Trover under the Code.*

—The terms, trespass, case, trover, etc., do not apply to the form of the present action, although they are still used to indicate the nature of the injury; nor does the idea always correspond to the forms of the old actions. A trespass is still held to be an injury to the possession, immediate and with force; while we now understand by the word trover a conversion of property supposed to have come rightfully into the possession of him who wrongfully converts it to his own use. A conversion by a wrongful taking is a trespass, although formerly the action of trover would lie. There is now no excuse for confounding the two terms, and when a petition shows a tortious taking, the term trover should not be applied to the action.

\* *Heine v. Anderson*, 2 Duer, 318.

† 1 Chitty Pl., 148.

‡ See Chitty's Precedents.

§ Id. 168.

§ 13. 3. *Title to Choses in Action—Non-negotiable Instruments.*—At common law only bills of exchange, payable to order, were so transferable as to vest the legal title in the holder. To these have been added by statute, negotiable promissory notes.\* In all other contracts, the legal title was in the person to whom the promise was made, and from whom the consideration passed. If it had been transferred to another, he was called the equitable owner, but could not sue at law in his own name. The code, however, has adopted the equity rule, and requires the action to be instituted in the name of the real party in interest, that is, in the name of the equitable owner. Thus all contracts are made transferable, and in effect so far negotiable as to enable the holder to sue in his own name. The petition should show his title to the instrument, that it has been sold and transferred to him, not by the commercial term, indorsed, for that is a technical word applying to another class of paper, but by any appropriate language showing the transfer.

§ 14. *Continued—Negotiable Paper—Striking out Indorsements.*—In actions upon negotiable bills and notes, the code has made no change, for the legal as well as the equitable title passes to the indorsee. As between the maker and payee of a promissory note, and the acceptor and payee of a bill of exchange, the title of the payee appears from the relation of the parties, and none other should be alleged. But if suit be brought by the indorsee, he must show the indorsement, and in general, in an action upon a note or bill, by any one not an original party, his pleading must show the facts that give him title.† Paper is sometimes made payable to, or is indorsed to an agent of, the true owner, when suit may be brought in the name of such agent, as is shown under the head of parties to actions. When there are several indorsements, and suit is brought by the last or a late indorsee against the original parties, or one of the earlier indorsers, the intermediate indorsements between the plaintiff and the persons sought to be charged, except such as may be necessary to show his title,

\* 3 Kent. Com. 92.

† Jaccard v. Anderson, 32 Mo. 188; Rousch v. Duff, 35 Id. 122.



may be stricken out, and the instrument treated as though indorsed directly to the plaintiff, instead of mediately. His allegation of indorsement to himself is true, and the defendant's liability follows the paper, and he cannot be injured by the fact that the plaintiff neglects to lay his title through all the intermediate indorsements. And "when the title to a bill or note reverts in a party by whom it has been indorsed, he may strike out his own and all subsequent indorsements, whether special or in blank, and either plead it or give it in evidence, without a variance or departure from the allegations of a declaration on his original title." "*Aliter*, when his original title is invalidated by a failure to give notice of non-acceptance, or otherwise, and he is forced, as in the principle case (*Bartlett v. Benson*) to rely upon one growing out of the retransfer to him."\*

\* Hare & Wallace, note to *Bartlett v. Benson*, 14 M. & W. on p. 740, and quoting *Dugan v. U. S.*, 3 Wheat. 183; *U. S. v. Barker*, Paine, 156; *Picquet v. Curtis*, 1 Sumner, 480; *Lonsdale v. Brown*, 3 Wash. C. C. 404; *Norris v. Badger* 6 Cow. 449; *Ellsworth v. Brewer*, 11 Pick. 316. See *Gorgeratt v. McCarty*, 2 Dallas, 144; *Weakly v. Bell*, 9 Watts, 278. This question is not without difficulty. The weight of authority sustains the doctrine of Hare & Wallace's note as given in the text, but there are cases to the contrary, as shown in note *d*, 1 Parsons N. & B., p. 357. The Kentucky Court of Appeals (*Bell v. Morehead*, 3 A. K. Mar. 158), upon the collateral question that the possession of paper by a previous holder is *prima facie* evidence of his right to it, after a rehearing, thus gives its conclusion: "As to the case of bills of exchange, however, some authorities are strong, that proof of actual payment is necessary to entitle the intermediate indorsee to recover, while others admit the bare holding of the bill as good proof. The bare possession of the bill furnishes a violent presumption that the person to whom it had been indorsed had not parted with it without payment; and we have no doubt that the doctrine which admits the possession of the bill as good evidence, will be of great convenience in the mercantile world, and that it will enable dealers in such paper to recover their demands, frequently without the necessity of proving that they have actually paid their indorsees who may be distant and almost inaccessible. Being at liberty to choose, therefore, among conflicting decisions, between proof of actual payment and possession as *prima facie* evidence of that payment, we have again adopted the latter rule as most convenient and equally conducive to the ends of justice." The plaintiff below had declared upon a negotiable note made by the defendant and indorsed by the payee to the plaintiff.

## RULE II. THE PETITION MUST SHOW PRIVITY.

§ 16. *Two-fold Application of the Term.*—The term privity denotes relationship, and it is used to indicate the relationship between the adverse parties to the action as regards the property or contract, in respect to, or upon which the action is brought, as determining whether the action will lie, and also the relationship between one of the parties and others, as determining questions of evidence. Thus, in the latter case, the admission of one person will not be received against another unless there is a privity between them, as of a donor against the donee, a lessor against the lessee, an ancestor against the heir, a testator against the executor, partners and joint-tenants against each other, etc., and when they are identified in interest.\* In this application the term privies is used as distinguished from parties. Thus we say, the parties and privies to a deed are bound, etc. But the rule of pleading now under consideration, can only have reference to the relationship first spoken of, and the term is used to cover every connection that can exist between the parties to actions sounding in contract. Questions may arise under this rule that would be suggested by the one last considered, concerning title, and also in considering the subject of parties to actions, especially the latter, yet the scope of each subject is distinct. The obscurity which seems to have surrounded the term privity has arisen from its double application as above given, and also from the fact that the term *title*, is often used, and by good lawyers, to denote a right of action arising as well from privity as from property in the subject of the action.

§ 17. *Different kinds of Privity.*—Jacob says that “there are five several kinds of privies, viz: Privies of blood, such as the heir to the ancestor; privies in representation, such as executors or administrators to the deceased; privies in estate between donor and donee, lessor and lessee, etc.; privies in respect to contract; and privies on account of estate and contract together.” Questions in relation to privity of blood and of representation more frequently arise in the law of evidence, and so far as they affect pleadings are considered under

\* 1 Greenl. Ev., § 189.

other rules. Privity in estate, in contract, and in both, was usually applied to the relation of landlord and tenant, but, as we proceed, the term *privity* will be used in a broader relation, and must be considered when contracts of whatever nature are sought to be enforced.

§ 18. *Privity between Landlord and Tenant*.—When the suit is between the original parties to a lease, or when it is for use and occupation, privity necessarily appears. But sometimes one would charge a liability arising from privity of estate which did not appear from the contract upon which the suit is based. Thus the assignee of a term comes into relations with the lessor, and there arises a privity of estate; the lessee who, before the assignment, was privy both in estate and in contract, has parted with his interest in the estate, and thenceforth is privy only in contract. To impress the matter more firmly on the mind, I will quote from one of the fathers of the common law, in a case\* where an action was brought for rent against the assignee of the lessee. "As to the matter now in question, there are three manners of privities: *scil.* privity in respect of estate only, privity in respect of contract only, and privity in respect of estate and contract together. Privity of estate only; as if the lessor grants over his reversion (or if the reversion escheat) between the grantee (or the lord of escheat) and the lessee, is privity in estate only; so between the lessor and assignee of the lessee, for no contract was made between them. Privity of contract only is personal privity, and extends only to the person of the lessor and to the person of the lessee. As, in the case at bar, when the lessee assigned over his interest, notwithstanding his assignment, the privity of contract remained between them. \* \* \* The third privity is of estate and contract together; as between the lessor and the lessee himself." Mr. Taylor, in his treatise upon the American law of landlord and tenant† thus states the doctrine: "A lessee during his occupation holds both by privity of estate and of contract. His *privity of estate* depends upon, and is co-existent with the continu-

\* Walker's Case, Coke's Rep. Part 3, p. 22. This case is recommended for attentive perusal.

† 436.

ance of his term. By an assignment, he divests himself of this privity and transfers it to his assignee; it remains annexed to the estate into whose possession soever the lands may pass, and the assignee always holds in privity of estate with the original landlord. The *privity of contract*, however, is not transmitted to the purchaser, on an assignment by the lessee, for his express covenants will, during the term, be obligatory upon him and his personal representatives, even for breaches after an assignment and acceptance of rent by the lessor;\* but in case of covenants in law, after an assignment of the term, no action lies against the assignor."

§ 19. *Continued*.—Even if the lease contained a covenant against the assignment, this privity of estate and consequent liability exists on the part of the assignee; for, if one enters under an assignment and enjoys the premises, he is estopped from denying its validity. Such covenant is for the benefit of the lessor, which he may waive by treating the assignee as his tenant.† But there is no such privity if the original lessee shall underlet, *i. e.*, shall make a sub-lease for a part of the term. It is not a sub-letting if he make a lease for part of the premises for the full term, for that is treated as an assignment *pro tanto*, and so far, a privity of estate is created between such assignee and the lessor;‡ but it covers only the part assigned and he would not become thereby liable for the whole rent, or for damage done to the premises not assigned.§ And, in general, whether in leases or deeds of conveyance, a privity of estate, and consequent liability exists between lessor and assignee, or vendor and remote vendees between whom there is no express covenant, as to all covenants that run with the land. ||

§ 20. *Same—Created by Statute*.—In this class of cases, privity of estate has been created by statute, where it did not exist at common law. A tenant could not be required to attorn to

\* See cases cited by the author.

† *Blake v. Sanderson*, 1 Gray, 332.

‡ *Patten v. Deshon*, 1 Gray 325; 1 Doug. 183.

§ 2 East, 575.

|| *Taylor's Landlord and Tenant*, § 260.

a stranger, and hence the assignee of the reversion, though he might recover for rent arrear, could neither sue nor be sued upon the covenants of the lease.\* The statute of 32 Henry 8, c. 34, which has been generally adopted in this country, either directly, or by adopting statutes applicable to our condition previous to certain dates, authorized actions by and against assignees of the reversion. The statutes of New York,† of Wisconsin,‡ and of California,§ give the fullest remedies to the assignees both of the lessor and of the lessee, against the other party. The statutes of Kentucky,|| of Indiana,¶ of Kansas,\*\* and of Missouri,†† give rights of action between the assignee of the lessor and the lessee, which would seem to be sufficient, for, as was shown in § 18, one who takes an assignment from a lessee, becomes at once privy in estate with the lessor.

§ 21. *No Privity between Owner and Adverse Holder.*—It is sometimes supposed that rent, as for use and occupation, can be recovered by the owner, against one who makes wrongful entry and holds adversely. But the relation of landlord and tenant does not exist; there is no privity between them either of estate or of contract, and none has been created by law.‡‡ Nor can money received by an adverse holder of the realty from rents,§§ or sales of timber,||| or from the sales of the land itself, be received by the plaintiff by showing that the land was his,¶¶ for it was not in fact received for his use, but adversely; and the law, which raises such use in certain cases, as we shall presently see, does not create a privity in matters so pertaining to the realty.

§ 22. *Privity in Commercial Paper.*—Although the law merchant regulates the rights and liabilities of parties to nego-

\* Id. § 439. † Vol. 1, Stat. at Large, 698. ‡ Stat. of 1871, p. 1167.

§ Civil Code §§ 821-3.

|| G. S. of 1873, p. 603.

¶ 2 Statutes, &c., of 1862, p. 360.

\*\* G. S. of 1868, p. 541.

†† W. S. 832.

‡‡ Edmondson v. Kite, 43 Mo. 176; Taylor's Landlord & Tenant, § 636.

§§ Codman v. Jenkins, 14 Mass. 96; King v. Mason, 42 Ill. 223.

||| Bigelow v. Jones, 10 Pick. 161.

¶¶ Brigham v. Winchester 6 Met. (Mass.) 460.

tiabile paper, yet the relationship of the acceptor of a bill or the maker of a note to its indorsee, although he is not named in the instrument, is created by the contract. They not only obligate themselves to the payee, but to whomsoever the payee shall direct, and whoever shall be the lawful holder of the instrument at its maturity, is, by its terms, in privity with the maker or acceptor. And so, as between the drawer and payee, and indorser and indorsee, the relation is the act of the parties. But by the custom of merchants, a stranger is authorized to accept a bill for honor *supra protest*, and to save the credit of any party who would be otherwise chargeable upon the paper. The stranger thus becomes an accommodation acceptor, and on behalf of the drawer or of any indorser at his option,\* and by so doing, and without any request from the person for whose honor he accepts, a legal relation, a privity is created between them.

§ 23. *Privity in other Contracts*.—In ordinary personal contracts there is no privity except between the parties; yet the statute authorizes an action in the name of whoever may be the owner, the assignee of the contract. Being unassignable at common law, it was necessary to bring suit in the name of the legal holder, who was the person with whom the engagement was made, and from whom the consideration proceeded.† But all this is changed by the code, and indeed, it had long before been changed in effect by authorizing the holder of a non-negotiable instrument to sue in the name of the legal holder to his use, and in equitable actions to sue in his own name. The code adopts the equitable rule and the holder may bring an action in his own name, but as we have seen under a former rule, he must show in his pleading his title or right to the paper. This change extends to an account or any claim sounding in contract, and the privity may be said to be created by statute.

§ 24. *No Privity in Torts*.—It may be thought that, inasmuch as rights of action arising out of some torts are assignable, so that the assignee may sue in his own name, it would be

\* 1 Parsons on N. & B., pp. 313, *et seq.*

† *Ante*, § 13.

proper to say that a privity exists between the assignee and the *tortfeasor*. But the term is not applied to torts, but only to relations created by contract, or to property held in harmony with the title of the party with whom the privity exists. This may seem inconsistent with the application of the term in the next few sections, but the inconsistency is only apparent.

§ 25. *Privity arising from an Equitable Obligation*.—Privity is sometimes created by an equitable obligation, and, perhaps, an implied promise, when the party who may avail himself of it is ignorant of the transaction from which it arises. Ordinarily, the law will not imply a promise, unless the matter in regard to which it is implied had its origin in the promisor's request. For the law will not impose upon one a contract which he did not make, or which is not implied from his act. But there is an apparent exception in the case of money had and received to the use of another, and it was never necessary to allege that it was so had at the request of the person sought to be charged. It was supposed to have been paid over to him by a third person to the use of the plaintiff, and, perhaps, without the plaintiff's knowledge; and the law established such a privity between him who received it, and its equitable owner, that, in the equitable action of *assumpsit*, he was authorized to sue in his own name, and lay a promise to himself. The fictitious promise is now dispensed with, but the privity exists and the liability is the same. The question arises, first, when a defendant, for a good consideration, moving from a stranger, as by paying over money, promises such stranger that he will pay the plaintiff; and, second, when money is sent to the defendant to be paid over to the plaintiff, which money the defendant receives and holds, but neglects to pay it over.

§ 26. *The two Branches of the Question Considered*.—Upon the first branch of the question the Supreme Court of New York\* says: "Whether, when one person makes a promise to another for the benefit of a third, such third person can maintain an action upon it, though the consideration does not

\* Del. & H. C. Co. v. W. Co. Bk., 4 Denio, 97.

move from him, has been a question involved in a conflict of opinion, as well at the bar, as, to some extent, in the judicial decisions; but we consider it now well settled as a general rule, that, in cases of simple contracts, the person for whose benefit the promise is made, may maintain an action in his own name upon it, though the consideration does not move from him." And the judge delivering the opinion cites a large number of authorities in support of the proposition. Upon the second branch of the question the law is not quite so clear. Still, if the defendant receives and holds the money, without affirmatively refusing to comply with the request, he is held to consent to the terms upon which it was put into his hands, and the law creates a privity between him and the person for whose use he is supposed to hold it. A case is given in Massachusetts,\* where a sum of money was remitted to defendant, by a debtor, with directions to pay the plaintiff a certain sum, and apply the balance upon the debt. The defendant kept the whole sum, and the court held him liable to the plaintiff, upon the ground that, in receiving the money without objecting to the directions, he must be considered as having consented to the terms and conditions named by the person who remitted it. This case is afterwards referred to approvingly by the same court.† If, however, the person to whom money may be paid for the use of another, refuses to receive or hold it upon the terms, it is believed that the law will not impose upon him a trust or duty in relation to such person against his will, so as to create a privity between them. It is held in Illinois that when two persons employed the same broker to sell cattle, owned severally, and of the proceeds the broker paid too much to one, and too little to the other, there is no privity between them, and the amount overpaid can not be recovered by the one who has received too little.‡ But it should be noted in view of what follows, that the party receiving too much money made no claim to the other's cattle, did not sell or attempt to sell them by his agent, the broker,

\* Hall v. Marston, 17 Mass. 575.

† Carnegie v. Morrison, 2 Met., on p. 396.

‡ Hall v. Casper, 27 Ill. 386, and Casper v. Hall, 29 Id. 502.



but was simply overpaid by the broker on account of his own cattle.

§ 27. *Privity by Election and Estoppel*.—Privity seems sometimes to be created by election, and upon the ground of estoppel. Thus, if a wrong-doer takes the property of another and sells it, the owner may treat it as a wrongful conversion and sue for damages, or he may waive the tort, and sue as upon contract for money had and received to his use. His right to do so is universally recognized, not that there is any real privity of contract between the parties, but the defendant will be estopped from setting up his own wrongful act as a defense.\* The pleadings would not differ materially from the case of a sale by the plaintiff's consent, where his title was acknowledged, although the whole controversy at the trial might be upon the question of title. If, however, the property taken by the wrong-doer has not been sold, the right to waive the wrong, and sue as for goods sold, is denied in Massachusetts,† in Pennsylvania,‡ and in Illinois;§ but is affirmed in New York,|| in New Hampshire,¶ in Wisconsin,\*\* in Maryland,†† and in Missouri.‡‡ The reporter's notes to Putnam v. Putnam, and Berley v. Taylor, §§ give the great weight of his opinion in favor of the latter view, and say in effect that there is no difference in principle, in regard to the plaintiff's right of election, between the cases where the defendant has converted the property, wrongfully taken, into money, and where he has not. In neither case will he be permitted to set up his wrongful intent in disavowal of the implied promise. The English cases he cites sustain his view.

\* Gordon v. Bruner, 49 Mo. 570.

† Jones v. Hoar, 5 Pick. 285, and note.

‡ Willetts v. Willetts, 3 Watts, 277.

§ Creel v. Kirkham, 47 Ill. 344.

|| Putnam v. Putnam, 1 Hill, 240, and note, and Berley v. Taylor, 5 Id. 584.

¶ Hill v. Davis, 3 N. H. 384.

\*\* Norden v. Jones, 33 Wis. 300.

†† Stockett v. Watkins, 2 Gill & J.

‡‡ Gordon v. Bruner, 49 Mo. 570.

§§ 1 and 5 Hill, *supra*.

§ 28. *When the Doctrine of the last Section is applied to Adverse Claimants of Land.*—Between the true owner and adverse holder of land, whether the latter be the disseizor or his assignee, there is no such privity as will make the adverse holder liable as upon contract. He is responsible for the wrong, but his wrongful appropriation can not be treated as a sale of the land; and "the reason given for the distinction between real and personal property is, that by ratifying the conversion of the latter, the title which may pass by mere delivery is thus confirmed in the assignee of the wrong-doer (or the wrong-doer himself); but the transfer of real estate is regulated by different rules, and great confusion would arise if it were predicated upon a money action."\* But "in an action of trespass against a municipal corporation for an illegal appropriation of land, it is held that a judgment for damages operates as a transfer of title, or dedication to the use for which it was appropriated. The distinction between this case and the same action against an individual, arises from the fact that in order to pass title to the city, no conveyance is necessary, and hence the seizure may be treated as the true owner might treat a conversion of personal property, and the title be affirmed in the wrong-doer by an action for damages."† Resting upon the authority of *Soulard v. St. Louis*, and the principle upon which it was based, the court in the case from which I have quoted, sustained an action in favor of the true owner of land, against one whom the city, having appropriated it to public use, had treated as the owner, and to whom it had paid the value assessed, as for money had and received to the use of such true owner. In comparing the two cases it was further remarked: "In both cases the city has taken property for public use. In the one the owner brings trespass and confirms the title by receiving the value, in the same manner as if he had brought an action for taking his horse; in the other, the city has paid the wrong person, and the owner, as no deed is required, may affirm the seizure by suing for the money which should have been paid to him, as he

\* *Tamm v. Kellogg*, 49 Mo. 118.

† *Soulard v. St. Louis*, 36 Mo. 546.

might do if his neighbor had wrongfully taken and sold his personal property."\*

RULE III. IN AN ACTION ON BEHALF OF OR AGAINST A CORPORATION, THE PETITION SHOULD SHOW ITS LEGAL EXISTENCE.

§ 29. *The Rule Imperative except, when.*—This rule is subject to another, that matters should not be pleaded of which the court will take judicial notice, and therefore it does not apply to actions by a domestic municipal corporation, or by a domestic private corporation created by a public act, for no issue of fact can be made as to the existence of such corporation. The court takes cognizance of the laws by virtue of which they exist and act, and they may sue like a private person. But when a foreign corporation comes into court, or a domestic one created by a private act, or when private proceedings are necessary to its creation, the court can not know of its legal existence; it is a question of fact upon which issue may be taken, evidence may be required in regard to it, and, therefore, upon principle, the fact must be pleaded. The distinction between corporations created by laws of which the court takes cognizance, and those that exist by laws or proceedings they are not supposed to know, has not always been made, and consequent confusion has arisen in the cases. But, subject to the exception arising from this distinction, and to another presently to be considered, pertaining to the effect of an admission of the plaintiff's existence in the contract upon which the suit is based, the pleader should show the facts that give the plaintiff a legal existence, and in such manner that issue may be taken upon them. I state this conclusion with diffidence, inasmuch as it seems to contradict some decisions by respectable courts, but it is the only one that can be sustained upon principle, or else I have failed to understand the foundation idea of pleading, as made imperative by the code.

§ 30. *The Common Law Form not to be Followed.*—In common law pleading, a corporation was allowed to declare in its corporate name, without averring that it is a corporation, or stating any facts showing its corporate existence, although it

\* Tamm v. Kellogg, *supra*.

became such by virtue of a private act or by virtue of private proceedings under a public act, and although it was a foreign corporation.\* We may admit this to have been the general, although it was not the uniform doctrine under the old system, where there were so many departures from the logic of pleading that its rules often became but arbitrary edicts. But before deciding to adopt it under code pleadings, courts should first enquire whether the legal existence of the corporation is an issuable fact to be established by evidence. If it is part of the plaintiff's case in fact, it is part of it on paper; for if there is any principle distinguishing the new system, it is that all ultimate facts necessary to be proved in making a cause of action, must be stated. The answer is simply a confession or denial of the plaintiff's allegations, or a statement of new matter of defense or counterclaim. A denial makes it necessary for the plaintiff to prove the allegation denied. A defense of new matter requires affirmative evidence by the defendant of the truth of the new matter alleged. No issue of fact can be made except by an affirmation and denial, and the one who makes the affirmation must sustain it by evidence. If any matter is part of the plaintiff's case, he, upon issue taken, must prove it, and anything which is new matter of defense, must, if denied, be established by the defendant. And neither the plaintiff nor defendant should state any fact he is not thus required to establish, and, on the other hand, must state all facts he is thus required to prove.

§ 31. *Is the Plaintiff's Legal Existence a Fact to be Proved?*—

It is not denied that the legal existence of the plaintiff as a corporation is a fact which may be put in issue, and upon principle it is so put in issue by an affirmation by the plaintiff and denial by defendant, or by an affirmation by the defendant and denial by the plaintiff; and the question, as to which party is required to make the first allegation in regard to the matter, will be settled by considering who must offer the first evidence. The code does not change the rules of evidence. A fact once necessary to a cause of action is nec-

\* See Angell & Ames on Corp. § 632, and cases referred to in note 2; *contra*, Win. Lake Co. v. Young, 40 N. H. 420.

essary still. What a party was once required to prove he still must prove, and a pleading which does not state what is necessary to be proved, fails to state a cause of action. This was always so in theory. We now conform our practice to the theory. Was, then, the legal existence as a corporation part of the plaintiff's case? Could an issue be so made as to require, in the first instance, proof of the fact?

§ 32. *How, in Common Law Pleadings.*—It was well settled under the old system, that an issue could be so made as to the fact of incorporation as to require the plaintiff to prove it as part of his cause of action, notwithstanding he was not required to state the fact in his declaration. As to the manner of making the issue the courts differed. In England, and in many of the states, the general issue made it necessary for the plaintiff upon the trial to prove the fact of incorporation,\* unless it was created by a public act of which the court took judicial notice, or unless the defendant had so acknowledged its legal existence as to dispense with the necessity of proving it. In other states it was held that the fact of incorporation could only be put in issue by a special plea in abatement or

\* *Rees v. Con. Bk.* 5 Rand. 326; *Hargrave v. Bank of Illinois*, Breese, 841; *Jones v. same*, Id. 86; (*contra, dictum* in *McIntire v. Preston*, 10 Ill. 48); *Lewis v. Bank of Ky.*, 12 O. 132; *Bac. Ab. Corp. E.*, 2; *Henriquez v. Dutch W. I. Co.*, 2 Ld. Raymond, on p. 1535. See cases hereafter cited. The Maryland Court of Appeals thus states the common law rule, and distinguishes between a foreign corporation and one of whose existence the court will take judicial notice.

"That, on the general issue, it was necessary for the plaintiff to show its charter of incorporation, is clear, as will be seen by reference to the following authorities: (Pages corrected) 2 Ld. Raym. 1535; 1 Strange, 612; 2 Bac. Ab. 212. This law is adopted in New York by numerous decisions. 8 Johns. Rep. 378; 14 Johns. Rep. 245; 19 Johns. Rep. 303; 2 Cow. 178. At first view it might be supposed that this question had been decided differently in the *Farmer's Bank v. Whittington*, 5 Harr. & Johns., and that the want of a charter could only be taken advantage of by a plea in abatement. \* \* \* The charter of the *Farmer's Bank of Somerset* was a public law, which judicial tribunals were bound to notice, and being such, the plaintiff could not, before he could make out his title to recover, be called upon to show in evidence that which the court was bound *ex-officio* to notice." *Agnew v. Bank of Gettysburg*, 2 Harr. & Gill., on p. 493.

in bar, the general issue admitting the corporate existence.\* But in either case the issue was made, of which the plaintiff held the affirmative. If made under the general issue, the fact was supposed to be affirmed in the declaration, although not expressly stated, and it was frequently held that a plea of *nul tiel corporation* was bad because it amounted to the general issue, that is, that it was not new matter, but simply a denial of one of the plaintiff's supposed material allegations.† Where a plea of *nul tiel corporation* was permitted, being in the form of a special plea, a replication was necessary expressly affirming the incorporation upon which issue was taken, the practice being analogous to an assignment by replication of breaches in the conditions of a bond, after oyer by defendant and general averment of performance. In either case the plea was in bar and not in abatement, as the latter went only to a misnomer of the plaintiff and not to its existence,‡ and the plaintiff was bound to prove the fact of incorporation.

\* Soc. etc., v. Paulet, 4 Peters, 480; 5 Watts & S. 215; 3 Met. 245; 6 N. H. 197, &c.

† Spencer, Justice, in *Bank v. Weed*, 19 Johns. on p. 303, says, "It has been decided that plaintiffs are bound to prove, as *part of their title* that they are a corporation. This plea, then (*nul tiel, etc.*), is expressly against the rule; for the defendants attempt to put in issue, by a special plea, part of the plaintiffs' title to recover, and a fact which the plaintiffs must prove in the first instance."

‡ 1 Kyd on Corp. 284; 1 Saund. R. 340, 340 a.; *Guaga Iron Co. v. Dawson*, 4 Blackf. 202; *Ch. Soc. &c. v. Macomber*, 3 Met., 235; *Mayor v. Bolton*, 1 Bos. & Pull. 40; 6 Vin. Ab. 308. But little is found in the books in regard to the old plea of *nul tiel corporation*. The practice is believed to be as follows: If the plea concluded to the country it was a special issue, and the plaintiff must prove the incorporation. A similar plea was required by the New York revised statutes. If it concluded with a verification, the plaintiff must reply and state in some detail the facts giving it a legal existence, as the charter and user, or prescription and user, or whatever was relied upon. Kyd (on Corporations, p. 284) says: "If a man sue as the head of a corporation, the defendant may plead that there is no such corporation as that in whose right the plaintiff pretends to sue; to which the plaintiff may reply, setting forth the manner in which the corporation was constituted, whether it has existed by prescription, or been created by patent." He refers to 44 Assizes pl. 9, and to Bro. Corp. 44, to which I have not access. Inasmuch,

§ 33. *They are not to be Followed.*—I have thus referred to the old practice because it is decisive of what it should be under the code. Facts material to a cause of action are no longer stated in the replication, but must be shown in the petition. Answers of new matter are not permitted for the mere purpose of requiring the plaintiff to state his full cause of action, of new matter which the plaintiff cannot deny or avoid, and of new matter which is purely negative, and which the pleader can not and is not required to sustain affirmatively by evidence. I mean they are not permitted by the logic of pleading or by the doctrines of the code, although a special negative answer in regard to corporations is required however, as the general issue came to be held to require proof of incorporation, the special plea of *nul tiel corporation* was properly considered as violating the rule which forbade special pleas of matter which was in effect denied by the general issue, and went out of use.

In Pennsylvania (*Zion's Church v. St. Peter's Church*, 5 Watts, & S. 215), and in New England (*Christian Soc. v. Macomber*, 3 Met. 235; *Phoenix Bk. v. Curtis*, 14 Ct. 437; *School Dist. v. Blaisdell*, 6 N. H. 197; 37 Me. 42; 39 Id. 571), the old plea is still used. In Massachusetts it may be either a plea in bar or in abatement. In *Langdon v. Potter* the opinion says: "There are many cases where the matter of the plea goes to preclude the plaintiff forever from maintaining the action, and it may, therefore, be pleaded in bar, yet as in point of form it is a disability of the plaintiff, it may also be pleaded to the person." This language was quoted in *Christian Soc. v. Macomber* (3 Met. 235), as applicable to a corporation plaintiff, the court adding, "But though a perpetual disability of the plaintiff may be pleaded in bar, it may also be pleaded in abatement at the election of defendant," citing authorities.

Denio, Justice, in *Bank of Havana v. Magee* (20 N. Y. 355), while holding that a certain defect was not pleadable under the code, but that the code provides for a demurrer or answer in abatement when the plaintiff has no capacity to sue, said, "The objection is not that the plaintiff has not a capacity to sue, but that no person, natural or artificial, is named as plaintiff. Certain persons, as infants, idiots, lunatics and married women, can not sue except by guardians, next friends, committees, or, in case of married women, by joining their husbands in certain cases. This, I think, was what the provision refers to, and not the absence of a real person as plaintiff. The other expression, a defect of parties, refers to the absence of some person or persons who ought to be joined with the party on the record."

I quote these remarks of Judge Denio, for the purpose of calling attention to the confusion in the opinions, a want of distinction between

by the New York statute, as we shall see. And as before said, the doctrine more commonly held, that the plaintiff was required to prove the fact of incorporation under the general issue, implies an allegation of the fact in the declaration, and as the code tolerates neither fictitious statements nor supposed statements, the petition should affirmatively state the fact.

§ 34. *The New York Rule.*—In New York, previous to the cases where the plaintiff had no existence, and where he had no capacity to sue. A want of incorporation goes to the very existence of the plaintiff, while a real plaintiff may not be able to sue. The distinction is often lost sight of, and "no such corporation," is sometimes said to be an objection to the plaintiff's capacity to sue, *i. e.*, what is really a bar is made matter of abatement. It is for this reason that the same fact is sometimes called a matter in abatement or in bar, when it must, upon principle, be one or the other, and can not be both. I can imagine that this confusion of terms might have arisen from the manner in which corporations were anciently represented in the courts. Many of the boroughs existed by prescription, and though called by a certain name, yet they were represented by individuals, as the Mayor, or Burgesses, or Mayor and Burgesses, etc. A plea in abatement would lie for misnomer, which, in such case, would be that these persons had no right to represent the borough, no right to sue in its behalf; while an averment that there was no such borough would be a plea in bar.

This difference of expression, or different view in regard to this matter is at the bottom of the difference of opinion in regard to the effect of the general issue. If the non-incorporation of the plaintiff be mere matter of abatement, the same as where one's existence is admitted but he has sued in a wrong name, or where he has no capacity to sue in the particular case, or in the manner in which the suit is brought, it may be properly said, that, by pleading the general issue, or to the merits, the objection is waived. But if the plaintiff's corporate existence is not presumed, as is that of a natural person, but is matter of substance, and its averment is implied under the old system, and must be expressly made under the new, except when judicially known, or admitted by defendant, then, in the one case, the general issue, and in the other an express denial, are pleas in bar, and put the fact in issue. Matters in abatement were waived by pleading to the merits, hence the courts which held that the general issue admits the incorporation, use the expression that it admits the plaintiff's right to sue, instead of its existence. See language of Story in *Soc., &c., v. Paulet*, 4 Peters, 480, who adopted the Massachusetts view, Thompson, Justice, from New York, dissenting.



revised statutes, it was uniformly held that where judicial cognizance could not be taken of the existence of a corporation plaintiff, it must, under a plea of general issue, be established by evidence,\* and that *nul tiel corporation* was bad only because it amounted to a denial.† But the revised statutes of 1830 provided that in suits by a corporation organized under the laws of that state, it should not be necessary to prove its existence unless the defendant shall have pleaded the want of incorporation in abatement or in bar. This provision was held to be in force after the adoption of the code, and in 1864 was re-enacted to conform to the present phraseology in pleading.‡ If the incorporation of the plaintiff is not to be proved, it may be reasonable to say that it need not be pleaded,§ and for the same reason that would dispense with the averment when it was created by a public act of which the court would take judicial notice, or where the defendant, in the contract upon which the suit is based, has acknowledged the fact of incorporation. And the New York Court of Appeals has held a complaint good on demurrer where a domestic corporation was plaintiff, but there was no averment in regard to the fact of incorporation,|| two of the judges dissenting. Whether this holding would apply to a foreign corporation, has not been expressly decided by the court of appeals, although the supreme court in general term held the plaintiff under obligation, when the denial was general, to establish the incorporation by evidence.¶ In this case there was no allegation upon the subject, and no question of pleading was raised, but it is difficult to understand, under the rule compelling the plaintiff to state the facts constituting his cause of action, how he should be required to prove any fact which he is excused from stating. Again, in *Connecticut Bank v.*

\* *Bank of Auburn v. Weed*, 19 Johns. 300; *Bank of Utica v. Smalley* 2 Cow. 270; *Trustees of M. E. Church v. Tryon*, 1 Denio, 451.

† *Bank of Auburn v. Weed*, *supra*.

‡ See 2 Stat. at Large, 477, § 3.

§ *Shoe & Leather Bank v. Brown*, 9 Abb. Pr. 218.

|| *Phoenix Bank v. Darnell*, 40 N. Y. 410.

¶ *Waterville, Man'g Co. v. Bryan*, 14 Barb. 182.

Smith,\* the same court, at special term, held it obligatory upon a foreign corporation plaintiff to allege the fact of incorporation, unless the defendant had entered into a contract with it by its corporate name.

§ 35. *The Rule in some other States.*—The Supreme Court of California held it sufficient, *on demurrer*, for the complaint to allege that the plaintiff was a corporation under the laws of that state.† Indiana, Wisconsin and Kansas seem to have adopted the rule of common law pleading which dispenses with the necessity of any allegation upon the subject.‡ The

\* 9 Abbot's Pr. 168, S. C., 17 How. Pr. 487. See *Myers v. Machado*, 14 How. Pr. 149.

† Cal. Nav. Co. v. Wright, 6 Cal. 258.

‡ In *O'Donald v. Evansville, &c. R. R. Co.*, 14 Ind. 254, the defendant below demurred to the complaint upon the ground that it did not aver that the plaintiff was a corporation. The demurrer was overruled, the opinion saying that "it did not appear on the face of the complaint that plaintiff was not a corporation, or had not capacity to sue, and for the purposes of the suit they should be intended to be a corporation, the name being such as might be probably adopted." The action was upon a promissory note given by defendant to the plaintiff below, by its corporate name, and the court might have justified its holding by the rule hereafter to be considered in the text, that the defendant had admitted that the plaintiff was a corporation and would not be permitted to deny it; but the opinion places the decision upon other grounds. In *F. & M. Bk. v. Sawyer*, 7 Wis. 379, a demurrer to a complaint on the ground that it failed to show the plaintiff's incorporation had been treated below as frivolous. The Supreme Court held that the demurrer was not frivolous, inasmuch as courts had differed upon the question of pleading involved, but intimated that it should have been overruled, although the plaintiff might have been a foreign corporation. *Ryan v. Famers' Bk. of Mo.*, 5 Ks. 658, seems, by affirming the judgment below, to hold that the petition need not aver the plaintiff's incorporation, although no opinion is given.

The student of pleading cannot fail to observe that while some courts seem to regard the code as dispensing with all common law rules, others are disposed to adhere to such rules, although contrary to the general requirements and spirit of the code. It is well that the judicial instinct should lead us to walk in the old paths until the new are clearly marked, but an excess of this feeling is a bar to improvement. The whole theory of a general issue and its effect is swept away. All issues are special; the general denial of all the allegations of the other party, is a specific denial of each, as much so as

state of Iowa\* has enacted as follows: "A plaintiff suing as a corporation, partnership, executor, guardian, or in any other way implying corporate partnership, representative, or other than individual capacity, need not state the facts constituting such capacity or relation, but may aver generally, or as a legal conclusion, such capacity or relation; and when a defendant is held in such capacity or relation, a plaintiff may aver such capacity or relation in the same general way." Thus, in that state some of the questions embraced in this rule are settled by legislation.

§ 36. *Effect of acknowledging the Incorporation by the Defendant.*—I have alluded to a supposed exception to the requirement to plead the fact of incorporation arising from its acknowledgement by the defendant. There are a multitude of cases bearing upon the subject, and, to understand them, a distinction should be made (though it does not always appear in the cases) between a pretended corporation, one having no existence in fact, and one irregularly organized, or which may have forfeited its charter. In regard to the latter class of cases there has never been but one opinion, and such an irregularity in forming the company, especially if the defendant has participated in it, or, such a nonuser or misuser, as would be a sufficient ground to produce a forfeiture of corporate rights, can not be taken advantage of collaterally in an action by a corporation *de facto*, but the irregularity or the nonuser or misuser must be ascertained by a direct judicial proceeding, and the forfeiture judicially declared.† But it is also held, when one makes a contract with the plaintiff by a corporate name, that, in an action upon such contract, he is estopped from denying though denied *seriatim*, and there can be no denial of that which is not alleged. The courts in those code states which excuse the allegation of incorporation, act upon the old theory either that it is supposed to be alleged, or that it may be set out in the replication.

\* Code of 1873, § 2713.

† *Hughes v. Bank of Somerset*, 5 Litt. 45; *Scarsburg T. Co. v. Cutler*, 6 Vt. 315; *Brookville T. Co. v. McCarty*, 8 Ind. 392; *John v. Farmers' Bank*, 2 Blackf. 367; *Trumbull Ins. Co. v. Horner*, 17 O. 407; *Rice v. Rock I. R. R. Co.*, 21 Ill. 93; *Tarbell v. Page*, 24 Id. 46; *Palmer v. Lawrence*, 3 Sandf. S. C. 161; *Tar R. Nav. Co. v. Neal*, 3 Hawks, 520.

its corporate existence,\* although this doctrine has been disputed by very good authority.†

§ 37. *Language of the Courts upon this Question.*—The case of *The Welland Canal Co. v. Hathaway* is quoted in Bigelow on Estoppel (p. 477) without comment, and, it appearing to be contrary to most other decisions, a brief review of some of them may enable us to decide what, upon this subject, may be considered as established.

Angell & Ames in their work upon Corporations, towards the close of section 635, use the following language: "When a cognizance, mortgage, note, or other instrument is given to a corporation, as such, the party giving it is thereby estopped from denying the corporate existence of the corporation; no further proof thereof is necessary until such proof is rebutted." The last phrase, intimating that the admission of incorporation by the contract is a mere question of evidence, and may be shown to be untrue, is contrary to the idea of estoppel, and is not sustained by the authorities referred to, unless by *Den v. Van Houton*.‡ In this case the action was not by a corporation, but by a private person, on a mortgage given to a corporation, and assigned to him. The objection was that it had not been proved that the assignor was a corporation, and to this objection the court says, "in such case the admission by the defendant himself in the deed of mortgage, under his hand and seal, is, as against him, sufficient proof, when uncontradicted, of the existence of the corporation." The words "when uncontradicted," imply that the court treated the admission by the mortgage as matter of evidence merely, and this further appears by the citation of *Mayor, &c., v. Blamire*,§ where the issue was upon a plea in abatement for misnomer. The plaintiff, being admitted to be a corporation by prescription, sued upon a covenant for quiet enjoyment, in a deed by defendant's

\* *Cong. Soc. v. Perry*, 6 N. H. 164; *All Saints Ch. v. Lovett*, 1 Hall, 191; *Ryan v. Vallandingham*, 7 Ind. 416; *Brookville T. Co. v. McCarty*, 8 Ind. 392; *Tar R. Nav. Co. v. Neal*, 3 Hawks, 520; *Wor. Med. Inst. v. Harding*, 11 Cush. 285; *Farmers, &c., Co. v. Needles*, 52 Mo. 17.

† *Welland Canal Co. v. Hathaway*, 8 Wend. 480.

‡ 5 Halst. 270.

§ 8 East, 487.

ancestor, which described the plaintiff by another name. The declaration showed that the citizens, etc., were from time immemorial incorporated by divers names, and by the name mentioned in the deed; held that the deed was evidence of such name as against those who claim under the grantor.

In *Cong. Soc. v. Perry*,\* the language of the court is: "The giving a note is an admission by the defendant of the existence of the corporation, and he can not now be permitted to deny that there is a duly organized corporation." In *All Saints Church v. Lovett*,† the defendant had been treasurer of the society, and suit was brought for the balance in his hands. The court held, he "should not be permitted to allege that the original incorporation of the church was invalid or irregular," as he sought to do. In *Ryan, assignee, v. Vallandigham*,‡ the defendant had made notes to the plaintiff's assignor, a corporation, and in the suit upon them, the court held, that if the corporation could, under the constitution, have a legal existence at the time the notes were executed, "the defendant, having contracted with it as such, can not be allowed to deny it;" and the same language is afterwards used in *Brookville T. Co. v. McCarty*.§ In *Worcester Med. Inst. v. Harding*,|| the opinion of the court says: "It seems to be well settled that the defendants, having contracted with the corporation, would be estopped to deny its existence." In *Meikel v. The German, &c., Soc.*,¶ the defendant below was not allowed to plead that, at the time of the execution of the note sued on, the plaintiff was not a corporation, but was permitted to say that it was not at the commencement of the suit. The Kentucky courts adopt the doctrine without reservation. "The note sued on estops the defendants and will not permit them to deny the legal existence of the plaintiffs."\*\*\* "The defendants are estopped to deny that there was such a corporation, by the very terms of their note, in which they promise to pay the president, direc-

\* 6 N. H. 164.

† 1 Hall, 191.

‡ 7 Ind. 416.

§ 8 Ind. 392.

|| 11 Cush. 285.

¶ 16 Ind. 181.

\*\* *Depew v. Bank. &c.*, 1 J. J. Mar. on p. 380.

tors and company of the Bank of Gallipolis," &c.\* "By executing the note payable to the corporation, the defendants were estopped to deny its existence at that time."†

§ 38. *Welland Canal Co. v. Hathaway.*—*Its Points.*—The rulings in New York are not as clear as in other states, owing doubtless to the able opinion of Judge Nelson in *Welland Canal Co. v. Hathaway*.‡ In this case the plaintiff was a foreign corporation, its corporate existence had been put in issue, and the court held that the defendant was not forbidden from denying it, although he had made a contract with the plaintiff by its corporate name. The reasoning was, in substance, that the defendant had done nothing which in equity should prohibit him from pleading the truth; that the doctrine of estoppel *in pais* did not apply; that it is a purely equitable prohibition; that a party will be concluded from denying his own previous acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. The agents of the plaintiff were not deceived; they knew whether the plaintiff had a corporate existence, and it was their fault, and not the defendant's, if they assumed a fictitious existence or fictitious powers. The opinion also denies that the defendant admitted either that the plaintiffs were incorporated by competent authority, or admitted any assumed powers. The contract shows only the fact of an association; "but if such association can exist without being incorporated, why infer more than appears on the face of the contract?"

§ 39. *Continued—First Point Examined—Estoppel in pais.*—If Judge Nelson was correct in defining the doctrine of estoppel *in pais*, it cannot apply to cases of this kind. Admit that the element of fraud on the part of him upon whom it operates may not be required, that it is not essential that the deception should always be intentional when the other ele-

\* *Bank of Gallipolis v. Trimble*, 6 B. Mon. on p. 601.

† *Jones v. Bank of Tenn.*, 8 B. Mon. on p. 123.

‡ 8 Wend. 480.

ments exist,\* still, when the estoppel is by conduct, there must be actual, if unintentional deception, by which the other party is influenced, and it is implied in his definition. But in the present case there could have been no such deception and influence to induce the plaintiff's agents to assume a fact which they knew did not exist. When estoppel by conduct is sustained, it has been on the ground that one party has been influenced by the other to do this, or that, that he has been made to believe what is not true in fact, generally when the other party knew better, though sometimes, under peculiar circumstances, the doctrine has been applied when both parties were equally ignorant.† But there are other classes of estoppel *in pais*, and which are more like estoppels by deed. Thus, as between landlord and tenant, the latter has acknowledged his landlord's title by taking a lease and entering under him, and by so doing the position of the landlord has been changed, and he might in consequence be greatly injured, if he who is thus suffered to enter should be permitted to dispute it. So with a bailor and bailee, the latter may have hired the property, or otherwise have contracted in regard to it, and thus obtained possession. If the tenant be evicted, or if a bailee be held to answer to the true owner, the estoppel ceases, but otherwise the rule is enforced, and it does not matter what opinion, as to their title to the property, was held by the landlord or by the bailor. The element of ignorance or deception does not enter into the case. The estoppel under consideration, if found to exist at all, must be based upon a similar foundation, and it may, perhaps, be called an estoppel by contract. Notwithstanding there may be no deception, there is an admission of a fact by the agreement, in consequence of which the plaintiff has parted with its consideration, as in case of a note taken for money loaned, and a denial of the fact would work injury to the extent of such consideration.

§ 40. *Continued—Second Point Examined—No Admission in Fact.*—The other point is, that a contract with a corporation

\* See *Cahill v. Landers*, 44 Barb. 218; *Taylor v. Zepp*, 14 Mo. 482; *Dolde v. Vodecker*, 49 Id. 98.

† *Dolde v. Vodecker*, *supra*.

by its corporate name seldom shows the fact of incorporation. It may be a joint stock company or a partnership by the same name; hence the corporate existence is not admitted. To this it may, perhaps, be said, that one who is estopped, as by lease, does not necessarily admit in terms the fact which he is not permitted to deny. He contracts to pay rent for the use of certain property; the lessor may have no title, yet so long as he is undisturbed the question does not concern him. So with one who has contracted with a corporation; it does not concern him whether the plaintiff be a corporation or a joint stock company, or a partnership; he has admitted a legal existence by a certain name; for a good consideration, has obligated himself to whomsoever that name represents, and ought to respond. This may not answer the objection, and it is to be regretted that the courts that have thus applied the doctrine of estoppel, have not given their reasons for so doing.

§ 41. *As to Defendant's Interest in having Plaintiff sue by his True Name.*—We have seen that if the plaintiff be a corporation *de facto*, the regularity of the organization can not be enquired into collaterally, and that would meet most of the cases where its legal existence would be denied by a defendant. But in the case last supposed, can it be said that the defendant has no right to require that the plaintiff shall sue in his true name? Suppose he has given a note to a partnership by a name like those applied to corporations, and he is sued upon the note, may he not demand that the names of the parties appear in the record? If they sue by the name given in the note, the petition may not be demurrable, for it shows a contract made with the plaintiff by that name, and the defendant has, at least, acknowledged the existence of of some body or persons capable of contracting by that name. It would, therefore, appear that, if he object at all, he should plead in abatement for *misnomer*; and this raises the question whether, inasmuch as *misnomer* is not one of the grounds of demurrer, etc., named in the statute, it can be pleaded under the code, and what in such case should be the remedy—questions to be considered in other connections.



§ 42. *Whether called Estoppel or Admission, the Pleading the Same.*—But, whether we say that by contracting with the plaintiff in the corporate name, the defendant is estopped, will not be permitted to deny its corporate existence when the contract was made, or that he has merely acknowledged, but may disprove it, the effect upon the petition is the same. The plaintiff in either case, is relieved from the necessity of proving the fact as part of his *prima facie* cause of action. The petition shows the contract and the admission, and upon principle he should not be required to prove the fact admitted; it becomes matter of defence.

§ 43. *Otherwise, the Averment Necessary.*—But without such admission, when one comes into court claiming to be an attorney for something which may or may not have an existence, a mere phrase as it stands, and institutes a proceeding on behalf of that phrase, it would seem that there should be an averment showing that the phrase stood for something having a legal existence, unless such existence is already known by the court. If the phrase be the name of a natural person, his existence is presumed unless otherwise shown,\* and the body of the pleading shows his connection with the transaction in respect to which the suit is brought. But a corporation is an artificial person not presumed to exist even, and the phrase may stand for such artificial person, or for a joint stock company, or for a partnership, or for a private person, or for nothing at all. The allegation then that the plaintiff is a corporation, even if permitted to be made in general terms, would seem to be part of his cause of action.†

§ 44. *Conclusions.*—I arrive at the following conclusions upon this subject: 1. Of the existence of a public or muni-

\* See precedent for pleading "no such person" in Story's (Mass.) Pleadings, 91.

† Some of the New York cases make a complaint, if defective in this particular, demurrable because the plaintiff has not legal capacity to sue; others say that it is not demurrable unless it affirmatively appears that it has not such capacity. If evidence of incorporation is necessary, it is part of the plaintiff's case; he is only bound to prove the facts constituting his cause of action, and if any such fact is omitted in the pleading it is demurrable for that reason.

cipal corporation, or of a private corporation created by a public act, the court will take judicial cognizance, and the fact need neither be stated nor proved. 2. A private corporation is sometimes created by a private legislative act, or by some proceeding authorized by law, or by a foreign act or proceeding, of none of which can the court take judicial notice; its legal existence is a fact; unless the pleading shows that the defendant has admitted it or is estopped from denying it, its proof may be required, and every ultimate fact to be proved should be pleaded. To these propositions may be added two more, although they properly pertain to other subjects, to-wit: the manner of making statements, and the remedies for the violation of the rules of pleading. 3. When the action, as its gist or substance, does not involve the existence of the corporation, but is brought to enforce some right or redress some wrong, the allegation is introductory or explanatory, *i. e.*, matter of inducement, and the same particularity of statement should not be required as in matter of substance. 4. If there is an allegation of incorporation, but it is not sufficiently specific, the defect can not be reached by demurrer, but the defendant should move to make the pleading definite and certain.

§ 45. *Rule as to Corporation Defendants.*—In regard to actions against corporations, the same general rules should prevail, although, even on motion, the plaintiff should not be required to plead the charter or to state all the facts that would show its corporate existence, and he is excused for the reason that he is not supposed to know them.\* But a complaint upon a promissory note, which failed to allege that the defendant is an incorporated company, and that the note was transferred in due course of business by agents properly authorized, has been held to be demurrable as not stating facts constituting a cause of action.†

P. BLISS.

ST. LOUIS, Mo.

\* A general allegation of incorporation is sufficient. *Stoddard v. Onandaga An. Con.* 12 Barb. 573.

† *Merch. & M. Bk'g Ass. v. Spring Valley, &c., Co.*, 13 How. Pr. 227.

## VI. THE REPORTERS AND TEXT WRITERS.

*Alvanley (Lord).*—Lord Eldon judicially observed, that “in justice to the memory of Lord Alvanley he must say that he never in his life knew a more attentive and diligent judicial character.” *Johnes v. Johnes*, 3 Dow, 11.

*Ambler's Reports.*—“It is remarkable that the only published collection of the cases determined by Lord Northington, is that of Mr. Ambler; and it has been a frequent subject of regret that one, who, by a practice of upwards of forty years, was apparently so well qualified to publish the result of his experience, should have failed so lamentably in the task which he undertook. His reports are well known to be an extremely careless and imperfect production. The facts of most of the cases are stated shortly and defectively; in many the dicta of the judges, in some even the points themselves, have been erroneously reported. The only notice which some of the most important cases in the book have received, is a short memorandum of the point determined. The notes taken in the earlier part of his life evidently bear few marks of subsequent revision; and the frequent discovery of errors, has given a reputation for inaccuracy to the publication, which has deprived it of the weight to which it would have been entitled from the respectable name which is prefixed to it.” Preface to *Eden's Reports*, 2d ed.

*Arnould on Insurance.*—“An excellent book.” Parke, B., in *Gibson v. Small*, 4 House of Lords Cases, 399.

*Atkyns' Reports.*—“This case is miserably reported in the printed book,” said Mr. Justice Buller, “and it was the misfortune of Lord Hardwicke, and of the public in general, to have many of his determinations published in an incorrect and slovenly way.” *Lickbarrow v. Mason*, 6 East, 26 note; 1 Smith L. C. 739, 6th ed.

Mansfield, C. J.: “Unfortunately Lord Hardwicke's judg-

ments in general are known only by Atkyns' Reports, which are extremely inaccurate." *Olive v. Smith*, 5 Taunt. 64.

*Barnardiston's Chancery Reports*.—"I take the liberty of saying," observed Lord Eldon, "that in that book there are reports of very great authority." *Duffield v. Elwes*, 1 Bligh, N. S., 538; 1 Dow & Clark, 11, S. C. And this is the generally received opinion. Although Vice Chancellor Stuart in a recent case remarked that Barnardiston "is not a reporter to be relied on in all cases." *Holland v. Holland*, 20 L. T. N. S., 59. Mr. Wallace, however, very justly concludes that "the contrary opinion of Lord Mansfield, 2 Burrow, 1142, in the margin, like a good many of his lordship's other opinions, may be considered as now overruled." The Reporters, 32, 262-263, and 322. Woolrych, *Lives of Serjeants-at-Law*, vol. 11, pp. 537-538.

*Bracton*.—In Fitzherbert's Abridgment, tit. Garde, pl. 71, it is said by the whole court that Bracton was never held as an authority in our law.

*Burrow's Reports*.—"The dictum of Lord Mansfield in *Rex v. Wilkes*, as reported in Burrow, seems to lay down such a doctrine; but I may say of that, as Lord Mansfield himself said when speaking of Sir W. Blackstone, that what is reported is not always accurate; and I very much doubt, if Lord Mansfield ever did say what is contrary to all that is to be found in the books." Lord Campbell, C. J., in *Ex parte Newton*, 4 El. & Bl. 871.

In the earlier editions of Burrow there are no head-notes. But in the index there are statements equivalent to that which in more modern reports are called head-notes. 44 L. J., C. P. 213.

*Calendars of the Proceedings in Chancery in the Reign of Queen Elizabeth*, to which are prefixed examples of earlier proceedings in that court, from the reign of Richard II. to Elizabeth, inclusive. From the originals in the Tower. 3 Vols. folio, London, 1827-32.

Mr. J. Bayley of the Tower, allowed his name to be affixed to the preface of this extremely interesting work, and enjoyed the credit of having collected the curious specimens of ancient

petitions or bills prefixed to the volumes. The specimens were collected, and all that is valuable in the preface was composed by the late Mr. Lyons. See Mr. C. P. Cooper's work on the Public Records, vol. I. pp. 384, 455.

These volumes carry the history of equity jurisprudence to a very early period. "It would appear from them," writes Mr. Wallace, "that it has been in the law as in some other sciences, and that while one age has thought that with it was born all knowledge, we have, in truth, been left in the rear by times which we regard as buried in superstition and darkness. \* \* \* In truth, though Judge Story, and, probably, other writers from whom he copied, have spoken of Lord Nottingham and his successors as having brought equity into a science by enlarging its bounds and increasing its scope of action, any one who studies these records will see that the services of the great Father of Equity, and of those who immediately succeeded him, consisted much less in such action than in settling the boundaries of the system, defining its powers, restraining its extravagancies, and by bringing the whole into proper relations, made it the intelligent companion instead of the arbitrary mistress of the common law." The Reporters, p. 284.

In the great case of *Vidal v. Girard's Executors*, 2 Howard, at p. 196, Mr. Justice Story said: "Very strong additional light has been thrown upon this subject by the recent publications of the commissioners on the public records in England, which contain a very curious and interesting collection of the chancery records in the reign of Queen Elizabeth, and in the earlier reigns. Among these are found many cases in which the court of chancery entertained jurisdiction over charities long before the statute of 43 Elizabeth; and some fifty of these cases, extracted from the printed calendars, have been laid before us. They establish in the most satisfactory and conclusive manner that cases of charities, where there were trustees appointed for general and indefinite charities, as well as for specific charities, were familiarly known to, and acted upon, and enforced in the court of chancery. In some of these cases the charities were not only of a certain and

indefinite nature, but, as far as we can gather from the imperfect statement in the printed records, they were also cases where there were either no trustees appointed, or the trustees were not competent to take. These records, therefore, do in a remarkable manner confirm the opinions of Sir Joseph Jekyll, Lord Northington, Lord Chief Justice Wilmot, Lord Redesdale, and Lord Chancellor Sugden. Whatever doubts, therefore, might properly be entertained upon the subject when the case of *The Trustees of the Philadelphia Baptist Association v. Hart's Executors*, 4 Wheat. 1, was before this court, A. D. 1819, those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded."

*Coke (Lord), Hale (Lord).*—"Lord Coke and Lord Hale, two of the most eminent authors and judges that have ever adorned Westminster Hall." Lord Ellenborough, C. J., in *The King v. Wildey*, 1 M. & S. 190.

*Comyns' Digest.*—"This appears to me to be a satisfactory and binding authority; and the more so because I find that one hundred and fifty years afterwards it is quoted in a book of the highest authority, viz: Comyns's Digest, which alone would make it a satisfactory guide for us upon the present occasion." Kelly, C. B., in *Brinsmead v. Harrison*, L. R., 7 C. P. 552, 553, Exch. Cham. "That great lawyer, Chief Baron Comyns, gives the high authority of his sanction to the case." Blackburn, J., Id. 554.

*Court of King's Bench.*—"Sometimes the Court of King's Bench misunderstood the Exchequer Chamber, as appeared from Willes' Reports." Lord Eldon in *Parker v. Potts*, 3 Dow, 28.

*Cowper's (Henry) Reports.*—"In 1791, Mr. Justice Williams of North Carolina, observed, "The case of *Hambly v. Trott*, in Cowper, is not law, and further, I never knew a case in Cowper to be received as law in our courts." *M'Kinnie v. Oliphant*, 1 Haywood, 4.

*Criminal Law, Books of Authority in.*—"The argument in *Rex v. Tolfree*, 1 Moody, C. C., 243, affords an illustration among many which might be adduced, of the abstruse learn-

ing upon which the decisions of questions of criminal law often depend. The following books of authority were referred to by the counsel and the court: Hale's Pleas of the Crown, Hawkins' Pleas of the Crown, Dalton, Fitzherbert, Brooke, Staundforde, Lord Coke's Third Institute, the Year Books, the Statute of Westminster, East's Pleas of the Crown, and Leach's Crown Cases, several of which books are very little known by the profession, and from the quantity of obsolete and discarded law which is to be found in them, they would often mislead the unprofessional reader. The comparative weight of credit of these authorities, where they conflict, is a matter of professional science, which is not regulated by any determinate rules." First Rep. of the English Crim. Law Comm. p. 18.

*Davies' (Sir John) Reports.*—There is a MS. note in the hand-writing of Chief Justice Lee in a copy of this book, as follows: "The cases in this book are excellently reported. And this author was (as I have been informed) much admired by Lord Somers." "This is the first report of cases arising in Ireland, and ruled in the courts of justice there, that was ever made and published to the world." Preface. These reports were first published in English, Dublin, 1762, 8vo. Some copies of this edition do not contain the "Preface Dedicatory" to Lord Ellesmere.

*Dickens' Reports.*—"The accuracy of Dickens' Reports is not to be relied upon, and this case is a remarkable instance of their inaccuracy," said Vice Chancellor Stuart in *Holland v. Holland*, 20 L. T. N. S. 59.

*Duer on Marine Insurance.*—"A very excellent book by an eminent American jurist." Parke, B., in *Small v. Gibson*, 16 Q. B. 143, 157.

*Duke on the Law of Charitable Trusts.*—"I have always heard this treatise quoted as a book of high authority. It contains the readings of a man of great eminence in his profession; and I believe that the passage cited was a construction of the act by the very individual who drew it." Lord Eldon in *Attorney-General v. Brown*, 1 Swanst. 307.

*Eden's Reports.*—For a successor of Lord Hardwicke a

judge of rare and vigorous intellect was required, and one whose knowledge of the law was profound and extensive. Such a judge was Lord Northington, whose decisions are published by his grandson, the late Lord Henley, who was made a Master in Chancery by Lord Eldon, and who earned his promotion, says Lord Campbell, by editing the reports of Lord Northington. These reports are characterized for their accuracy and fidelity, and were principally drawn from the manuscripts of Lord Northington himself, which consisted of six volumes of note books and other papers. They embrace a period of nine years, from 1757 to 1766, which was the time his lordship occupied the woolsack.

The editor added to every case notes of subsequent decisions which were brought down to the latest period. To many cases he subjoined a short account of the doctrine as established or varied by subsequent cases, and the extent to which it was carried by them. The best edition is the second, which was published in two volumes, 8vo., in 1827.

*Fergusson's Treatise on the Consistorial Law of Scotland, with Reports of Decided Cases.*—8vo. 1829. "The reporter was a judge of great learning and experience." Macqueen on the Law of Divorce, p. 158, 2nd ed.

*Fortescue's Reports.*—In the preface, which consists of thirty-one folio pages, we are informed that "The grand division of law is into the divine law and the law of nature; so that the study of law in general, is the business of men and angels. Angels may desire to look into both the one and the other; but they will never be able to fathom the depths of either."

"Fortescue's Reports are obviously prepared with more than usual pains [they were prepared for publication before his death, but were not printed until 1748]; particularly some in the first part of the book. Justice Fortescue, A., however, generally strikes you as the prominent person in the judicial cast; his opinions having been apparently written out with more care than those of his brethern. The work is distinguished by elaborateness, and more, perhaps, by the solicitudes of taste, than by any power of thought." *The Reporters*, 253.

*Gibbs (Lord Chief Justice).*—"I know that Lord Chief Jus-



tice Gibbs did not always write his opinions." Lord Lyndhurst, L. C., in *The Queen v. Millis*, 10 Clark & Finnelly, 651, 652.

*Hardwicke (Lord).*—Lord Hardwicke succeeded Lord Talbot in the year 1737. The reports of his decisions during the twenty years he held the seals, are contained in Vesey Senior, Atkyns, and partly in Ambler and in Dickens. None of them are eminent reporters, either for accuracy or precision in the statements of the cases, or the language of the court, and even the decree is sometimes wrongly given. We have the high authority of Lord Eldon, that Lord Hardwicke's judgments "were not delivered at the time the case was heard, nor were they delivered at a subsequent period upon what might be recollected of the circumstances, or upon what might be recalled to the mind by a casual reference to the case, but they were written by his own hand, and delivered by him from what he had so written. This mode, which was much practised by him, and which, in my opinion, must have tended materially to raise the great name that belongs to his memory, I consider it always advisable, where practicable, for judges to pursue. I do not say that in every case a judge should write his judgment; but when the matter is complicated, and requires a minute attention to the facts, there is no course a judge can adopt more likely to lead to right conclusions, than the habit of writing his judgments, and delivering them from the paper he has so written." Speech of Lord Eldon in the House of Lords, on Chancery Reform, 28 April, 1836, Hansard, vol. 33, 3rd series, p. 406.

*Hetley's Reports.*—Sir Thomas Hetley is described on the title-page as appointed "by the King and judges for one of the Reporters of the Law;" but from the fact that his cases were not taken until the reign of Charles, and from other internal evidence, Hetley's Reports have never been esteemed official.

*Hobart's Reports.*—During all the time Coke's Reports were publishing, and for twenty-two years afterwards, no other reports were printed. "It became all the rest of the lawyers to be silent whilst their oracle was speaking." Pre-

face to 5 Mod. Sir Henry Hobart alone, his immediate successor in the Common Pleas, made a collection, which was published sixteen years after his death, and, though unskillfully edited, was commended by Sir Heneage Finch, who published a corrected edition, as "beautiful even in confusion."

*Irish Decisions in Criminal Law.*—"The Irish decisions are also numerous, and would be entitled to weight as authorities; but they are very little known in this country." First Rep. of the Eng. Crim. Law Comm., p. 21.

*Jacob's Law Grammar.*—"A very useful book in which many principles of the common law are collected." Burrough, J., in *Deane v. Clayton*, 7 Taunt. 498.

*Leonard's Reports.*—Lord Chancellor Nottingham, in his argument in the Duke of Norfolk's case, 3 Chan. Cas. 31, observed, that of the books which have lately come out, Leonard's Reports is one of the best.

*Lilly's Practical Register.*—It was observed by Mr. Justice Wright, in *Herbert v. Williamson*, 1 Wils. 324, that this book is authority in matters of practice.

*Littleton's Reports.*—Stephens, in his introduction to Lord Bacon's Letters, ed. 1702, p. 21, says: "This book bears the name of Lord Keeper Littleton's Reports, though I conceive it was never composed by him; many of the cases are verbatim the same with Hetley's Reports." But in the preface it is said, "that great care has been taken in the super-vision of these reports to leave out all cases already extant in any of the contemporary reports." Hetley was published in 1657 and Littleton in 1682. In a copy of Littleton in the possession of the writer, on the fly-leaf are notes written by Chief Justice Lee. After the character of the author from Lord Clarendon, vol. II. fol. 568, are these words: "N. B.—He was a better common lawyer than chancery man." In the opinion of Lord Campbell, these reports "are not very valuable." Lives of the Chancellors, vol. III. p. 300, 4th ed.

*Lofft's Reports.*—"As far as may be collected from a very careless report, the same point seems to have been decided in another case, Lofft, 184." Paley on Convictions, 132 note, 5th ed.

*Modern Reports*, Vol. VIII.—Lord Kenyon remarked that a certain case reported in this volume, is there totally mistaken, as nine in ten, he says, in that book are. *The King v. Harris*, 7 T. R., 239. This volume was severely condemned by the court in *Rex v. Williams*, 1 Burr. 386, and in *Rex v. Harrison*, 3 Burr. 1326.

*Nicholl (Sir John)*.—"A very learned and experienced judge." Lord Carnes, L. C., in *Fulton v. Andrew*, L. R. 7 H. L. 461.

*Nisi Prius Reports*.—On the subject of the value of *Nisi Prius Reports* it is not possible to forget Mr. Justice Bayley's very forcible appeal: "Very likely one's first thoughts at *Nisi Prius* may be wrong, and I am extremely sorry that they are ever reported; and still more so; that they are ever mentioned again, at least so far as my *nisi prius* decisions are concerned, because I think they are entitled to very little weight. What is said by a judge upon a trial is merely the first impression of his mind on a point coming suddenly before him, and which he had no opportunity of considering before-hand. *Doe v. Stanton*, 1 Chitt. Rep. 121. "And yet it is undeniable that well-weighed decisions are frequently made at *nisi prius*, on important points that never come before the courts; that many judgments, now regarded as land-marks, would have been lost but for *Nisi Prius Reports*. These, therefore, it is advisable to retain, though without the full force of recorded authorities; to continue them, in short, on the same footing as the more ancient collections, which were respected in exact proportion to the learning and judgment of the collector." *Law Magazine*, vol. iv. p. 18.

The reference to the dicta of judges at *nisi prius*, as binding upon succeeding judges, has been deprecated by very high authorities. When a dictum, even of Sir Matthew Hale, was cited to the Court of Common Pleas, when Lord Loughborough presided there, that learned judge said: "Although I entertain the highest respect for the authority and character of that great judge, yet it would be doing injustice to his memory, to take every hasty expression of his at *nisi prius* as a serious and deliberate opinion." And on the same occasion,

Mr. Justice Wilson remarked, that the passage cited was "a dictum, not a judicial opinion, of Sir Matthew Hale. Every one who hears me, must acknowledge the impropriety of construing all the conversation which passes between the judge and counsel at *nisi prius*, as legal decision." *Steel v. Houghton*, 1 H. Bl. 53, 63.

So in a later case, when an opinion, expressed extra-judicially by Lord Kenyon, was cited in the King's Bench, Best, J., said: "No man can entertain a higher respect for the memory of that noble and learned judge than I do, but *nisi prius* decisions, coming even from him, unless they have been acted upon by succeeding judges, sitting in banc, are entitled to very little consideration." *Parton v. Williams*, 3 B. & Ald. 341. And in a subsequent case, the same learned judge, when Chief Justice of the Common Pleas, says, in reference to a case before Perrott, B.: "It is not right to repeat opinions hastily formed, and delivered in the hurry of trial; and the practice of referring to them has occasioned all the confusion that the enemies of our law object to." *Johnson v. Lawson*, 2 Bing. 90.

*Parke (Baron)*.—"Probably the most acute and accomplished lawyer this country ever saw." Blackburn, J., in *Brinsmead v. Harrison*, L. R. 7 C. P. 554.

*Phillimore's Reports*.—"Learned and accurate reports." Dr. Radcliff in *O'Connel v. Butler*, Milward, 102.

*Phillipps (Samuel March)*.—A collection of the most interesting State Trials prior to the Revolution of 1688. 2 vols. 8vo. 1826. "Mr. Phillipps has executed his task with judgment and ability. His historical illustrations are judiciously selected, and his estimate of the merits of each trial are candid and discriminating in an uncommon degree. A manly spirit of good sense runs through the work, and clearly distinguishes the author as a man of a sound and cultivated understanding." *Law Magazine*, vol. 1, pp. 241, 242. This is a true and just criticism.

*Pollexfen's Reports*.—In North's *Life of Lord Guilford*, Vol. I. p. 110, 2nd ed., is this account of the preface to these reports: "By way of remark, to show how faction will get the better

of common sense and truth, even in men great pretenders to both, I must add that Pollexfen, an arguer for Sir Samuel Barnardiston, since the Revolution, published (or fitted for the press) a book of reports, as they are called, consisting chiefly of his factious arguments; and particularly in this case, (*Barnardiston v. Soame*); but most brazenly and untruly, in his preface, tells how 'he had carried the cause, if the Lord Chief Justice North had not solicited the judges to give a contrary judgment'; or to that effect. This book and preface was shown to the then Lord Chief Justice Holt, who did a singular piece of justice to his lordship's memory and honor; for he sent for the bookseller to answer it before him, and had suppressed the book, if he had not promised to change the preface, and leave out that scandal; which was done; but some copies had escaped before."

*Precedents in Chancery*.—Lord Brougham said that "the book is of no great repute; and that the judge who decided the case, Lord Keeper Harcourt, though a respectable lawyer, is certainly not to be ranked with the Parkers, the Finches, and the Hardwickses." *Jones v. Scott*, 1 Russ. & Myl. 269. Of Harcourt, it is true, that he is better known as a wit and politician, and the convivial associate of Swift, than as a chancellor; but as to "*Precedents in Chancery*," we must take the liberty of observing that his lordship is quite mistaken as to its character, and that, as he has on more than one occasion called it *Finch's Reports*, he probably confounds it with some other book of less authority, perhaps the "*Reports Temp. Finch*." Thomas Finch, Esq., was the editor of a new edition of "*Precedents in Chancery*," published in 1786, which the booksellers sometimes called "*Finch's Precedents*." Among the reports of an earlier date, the book entitled "*Precedents in Chancery*" has always been considered by equity lawyers as one of the most valuable. In the opinion of Chief Justice Willes, it was "the best book of Chancery Reports extant." *Gurnett v. Wood*, 7 Mod. 304, A. D. 1740. Lord Hardwicke has borne testimony to its great merit, and has further informed us that from the year 1689 to 1708, the notes of the cases were taken by Mr. Pooley, and from the latter period to 1722, by Mr.

Robins. Viner also mentions in his abridgment, that many of the cases in this collection were reported "by that great man Mr. Pooley." Vin. Ab. 408, pl. 19, in the margin; Law Magazine, vol. vii., p. 377; The Reporters, p. 310; Goldsmith Eq., p. 48, 6th ed.

*Rastall's Entries*.—"I had," said Lord Ellenborough, C. J., "a curiosity to know on what authority the precedents in Rastall were founded; and upon looking at his preface I find the author is anxious to discharge himself from all responsibility respecting that part of his book. He says, 'Understand this, good reader, that none of the declarations, pleadings, entries, and precedents that be in Latin in this book be of my making or compiling.' He then points us to the sources from whence they were derived, viz., four books. The only merit which he takes to himself, which is undoubtedly not an inconsiderable one, is in the arrangement of them and the index; assigning as a reason for so doing, in the concluding part of his preface, that he had been absent from the kingdom, 'and lacking conference with learned men.' This may be considered as a sufficient excuse for many errors; and, among others, for the insertion of that vicious precedent, on the sole authority of which we are desired to overturn the numerous authorities laid down by Lord Coke and Lord Hale, two of the most eminent authors and judges that have adorned Westminster Hall." *The King v. Wilday*, 1 M. & S. 190.

*Sedgwick (Theodore)*.—"An accomplished lawyer and jurist." Bramwell, B., in *Foley v. Fletcher*, 3 H. & N. 781.

*St. Leonards (Lord)*.—"One of the most eminent judges and writers upon the law of real property,"\* observed Grove, J., in *Clare v. Lamb*, L. R. 10 C. P. 339; and he might well have added that his "opinion in every department of jurisprudence is entitled to the highest respect." Bigelow, C. J., in *Hoxie v. Pacific Mutual Ins. Co.*, 7 Allen, 218.

*Style's Reports*.—In a copy of these reports, there is this note in MSS.: "During the times of the late Usurpation,

\* "The highest authority," Hoar, J., in *Amory v. Meredith*, 7 Allen, 400.

except in criminal proceedings, the law flourished, and the judges were men of learning, as Mr. Justice Twisden has often affirmed upon the Bench. Cases in Parliament, fol. 756."

Style's Reports are singularly valuable from the circumstance of being the only reports extant of the common law courts for several years in the Usurpation, during which Sir Henry Rolle and afterwards John Glyn, sat as Chief Justices of the Upper Bench.

*Swanston's Reports.*—These are reports of cases determined during the time of Lord Eldon. The author was a man of fine literary attainments and an accomplished lawyer. These volumes are among the very best of the chancery reporters. The canons of good reporting are rigorously observed. The reporter gives a full statement of the facts with an outline of the pleadings and the condensed substance of the arguments, with all the authorities cited. "The principal object of attention," he says, "has been to represent exactly the train of reasoning by which the court arrived at a conclusion, and connected the facts of the case with the general doctrine of the law." These volumes contain a series of decisions, in which by a union of juridical talent and learning never surpassed, the doctrines of equity jurisprudence assumed the character of a systematic science. Many of the cases are enriched by learned and accurate notes, which are of great value, as containing a full classification of authorities and discussions of questions of practical importance.

*Swinburne on Wills.*—"A very high authority on the doctrines of testamentary law, and of the former statutes." Sir H. Jenner Fust in *Drummond v. Parish*, 2 Notes of Cases, 332.

*Findal (Lord Chief Justice).*—"One of the most careful expositors of the law ever known." Brett, J., in *Dugdale v. Lovering*, L. R. 10 C. P. 200.

*Vernon's Reports.*—Vernon is the best of the old chancery reporters.\* His reports were published from his manuscripts

\* It has been observed that until Vernon's Reports were published, A. D. 1726, a man must attend the Court of Chancery many years, before he could acquire any tolerable knowledge of the rules and maxims of equity, on which the resolutions of that court were grounded. Cunningham, p. xxxvi. 3rd ed.

after his death, by order of Lord Chancellor King,<sup>†</sup> and were found to be quite imperfect and inaccurate. In the case of *Hardley v. Clarke*, in the Court of King's Bench, reported in the *Times* newspaper for May 28th or 29th, 1799, Lord Kenyon observed, that it had been an hundred and an hundred times lamented that Vernon's Reports were published in a very inaccurate manner; then told of some private reasons, which his lordship said he would not mention. Mr. Vernon's notes were taken for his own use, and never intended for publication. He was, said Lord Kenyon, the ablest man in his profession. In 1806 Mr. Raithby published a new and excellent edition of Vernon, enriched by learned notes and accurate extracts from the registrar's books; so that the volumes assumed a new dress and more unquestionable authenticity. A third edition was published in 1820. There is a famous dedication, "with a double aspect," of this book, to Lord Eldon, by the editor, who, after obtaining permission to dedicate it to him, and before the book was published, seeing his interested patron suddenly turned out of office, after some compliments to departing greatness, says, "But your felicity is that you contemplate in your successor [Lord Erskine] a person whose judgment will enable him to appreciate your merits, and whose talents have procured him a name among the eminent lawyers of his country."

*Vesey Senior*.—The fourth is the best edition. By Robert Belt, Esq., of the Chancery bar, in two vols. 8vo., 1817–18, and a Supplement, 2nd ed., in 1825. The editor made a thorough examination of the decrees and orders in the registrar's books, corrected the statements of the cases, added a copious index, and revised and improved the whole work.

*Wigram on Extrinsic Evidence in aid of the Interpretation of Wills*.—"An excellent work." Lord Wensleydale in *Grey v. Pearson*, 6 House of Lords Cases, 106, and in *Abbott v. Middleton*, 7 *Ibid.* 114. Mellor, J., in *Grant v. Grant*, L. R. 5 C. P. 737.

*Williams on Executors*.—"A work in itself of great author-

<sup>†</sup> By Mr. Peere Williams and Mr. Melmoth, in consequence of a dispute concerning the property in them. See 10 Mod. 530.



ity." Denman, J., in *Bradshaw v. Lancashire & Yorkshire Railway Co.*, L. R. 10 C. P. 194.

*Winch* (*Sir Humphry*).—"The quickness, industry and dispatch of Sir Humphry Winch." *Bacon Works*, vol. XIII. p. 205, ed. Spedding.

F. F. HEARD.

BOSTON, MASS.

## VII. SUMMARY OF ENGLISH DECISIONS.\*

## I. CHANCERY.

*Will—Legacy—Specific or Demonstrative—Ademption.*—*Mylton v. Mylton.* 44, L. J. R. (N. S.), Chancery, 18. A testatrix bequeathed all "her" money which should be "invested at her decease, to a trustee, upon trust in the first place to pay thereout her debts and funeral and testamentary expenses, and in the next place to pay to her nephew, H., for his life, the sum of 3,000l. invested in 'Indian security.'" At the date of her will the testatrix had bonds in the East Indian Loan of the value of 3,000l., but these were redeemed by the Indian government before her death, and at her death she had no money invested in Indian security. *Held*, that the legacy was *demonstrative* and not *specific*.

*Partnership—Right of Legatees of Deceased Partner.—Assets continued in Firm.*—*Vyse v. Foster.* 44 L. J. R., (N. S.), Chancery, 37. A. was partner in a firm under articles which provided that the surviving partners should purchase the share of a deceased partner at a valuation. There was nothing to show that time was the essence of the contract. A. died, having, by will, given his real and personal estate to three executors in trust for his children on their attaining the age of twenty-five, and with trusts in the meantime for investing in real or government securities. One of his executors was partner at the date of the testator's will, and at his death another of his executors became a partner; the third never was a partner. The value of the testator's share in the firm was ascertained in the mode prescribed, but the executors allowed it to

\* This collection of English decisions embraces such cases, of apparent interest in this country, determined in the various English courts, as are contained in the Law Journal Reports for the first quarter of the present year. It has been prepared by George M. Stewart, Esq., of St. Louis, Dean of the Law Faculty of Washington University.

remain in the firm until the children arrived at the prescribed age, and the children were credited on the books of the firm with the ascertained value of their father's share, with compound interest at five per cent. The arrangement was most beneficial to the firm, and it was very advantageous to the children. *Held*, that the contract for sale and purchase of the deceased partner's share was not affected by the delay in actual payment; that the relation of debtor and creditor, and purchaser and vendor, subsisted as well between the partners who were executors, and the co-executors, as between the other partners and the executors, and that the executors, who were or afterwards became partners, were not liable to account for the profits made by them individually, or by their firm generally, through the use of their testator's capital, nor were the executors who had assented to such employment under any such liability.

*Specific Performance—Principal and Agent.*—*Hamerv. Sharp*, 44 L. J. R. (N. S.), Chancery, 53. An estate or house agent to whom instructions are given to procure a purchaser for property, has not, though the price is named in the instructions, authority to enter into a binding contract with a purchaser to sell such property.

*Trade Mark—Denotation of Article—Trade-Mark in Gross.*—*Cotton v. Gillard*. 44 L. J. R. (N. S.) Chancery, 90. The inventor of a sauce gave it the name of the Licensed Victuallers' Relish, and designed a trade-mark for labels on the bottles containing it. He permitted his son to describe himself in his circulars and invoices as the sole proprietor of the sauce. The son became bankrupt and his trustee sold his interest in the sauce and its trade mark to the plaintiffs, who now sought to restrain the inventor from infringing the trade-mark. It appeared that the plaintiff did not know the defendant's recipe, but made a sauce which their witnesses deposed to be indistinguishable from the defendant's. *Held*, that a trade-mark could not exist in gross, and that, as the plaintiffs did not know the recipe for the original article, they could not have a right to affix the trade-mark to a sham article for the purpose of imposing on the public.

*Winding up—Bills drawn against Securities—Reduction of Proof.*—*In re* Barnard's Banking Company (Limited). *Ex parte* The Joint-Stock Discount Company (Limited.) 44 L. J.R., (N. S.), Chancery, 97. In this case Jessel, Master of the Rolls, held, under the doctrine of *Ex parte* Waring, 19 Ves., 345, that when securities which have been given as between drawer and acceptor, or indorser of bills, to secure payment of those bills, are realized and distributed amongst the bill-holders, such realization and distribution can be considered as effected *at the time* when the *bills* became due, and this, although the securities have not been realized. Hence, if such bill-holder prove his claim against the insolvent estate for the full amount, either in bankruptcy or chancery, and receive dividends thereon, he will be compelled to surrender so much of the dividends as has been paid upon that part of his claim which should have been deducted in consequence of the securities, and his proof will be reduced *pro tanto*. In this case several holders of bills, the acceptors of which had been indemnified by mortgages on ships, proved their claims against the banking company, for the full amount of their bills. A dividend was paid upon this proof. The discount company became subrogated to the rights of the provers. Afterwards the ships were sold and the proceeds of the sales divided among them. The official liquidators of the banking company now claimed to make reductions from subsequent dividends, on the ground that the previous dividend ought to have been originally calculated upon the balance of the value of the bills after deducting the securities, and not upon the whole value of the bills, notwithstanding the securities had not been realized at the time of the original proof, and that, in so far as the bill-holders had received dividends calculated upon a different principle, they had been overpaid. After stating the facts and reviewing the cases, the Master of the Rolls says: "Consequently he never ought to have proved for more than the difference, and if he could not help it, because at that time, the security was not realized and he did not know the amount for which he ought to have proved, then when the amount was actually ascertained and paid to him the

proof ought to be reduced, and if he has received the dividends the dividends ought to be paid back."

*Nuisance*.—The statute 24 and 25 Vict., c. 61, s. 4, gives power to a local board to make an outfall of drains beyond their district, with a proviso that nothing therein contained shall authorize them to pour any noxious matter into any stream. *The Workington Local Board v. The Cockermouth Local Board*, and the *Attorney-General v. Same*, 44 L. J. R. (N. S.) Chancery, 118, was an information to restrain the defendant, a local board under the act, from pouring noxious matter into a stream through an outfall beyond their district. Defendant tendered evidence to show that no damage was caused thereby. It was held by the Master of the Rolls, that when the legislature thought fit to impose certain conditions on a corporation for the protection of the public, the corporation could not be permitted to break the conditions and allege, in excuse, that they were unnecessary for the protection of the public; in accordance with the doctrine of the *Attorney-General v. The Oxford W. & W. R. Co.*, 2 Wilson, 330.

In *Salvin v. The North Brancepeth Coal Company*, 44 L. J. R. (N. S.), Chancery, 149, it was held by the Lords Justices, that a plaintiff seeking to interfere on the ground of nuisance with a work carried on in a normal manner, must, in order to sustain his suit, show that he has incurred actual and substantial or "visible" damage. The primary evidence of such damage should be that of ordinary witnesses. Scientific evidence should be resorted to, not to establish the fact of damage, but only to explain the causes of it. In this case the bill sought by a mandatory injunction, to prevent the defendant, who owned a colliery company, from erecting or working any coke ovens or other ovens, to the nuisance of the plaintiff, the nuisance alleged being from smoke and deleterious vapors. The doctrine laid down in the *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642; 35 L. J. R. (N. S.), Q. B. 66, was declared applicable, which was in substance as stated above. There was a contention over the use of the word, "visible," by the Master of the Rolls, as inaccurate. Lord Justice James upon that subject said: "When the Master of the

Rolls said that the damage must be visible, it appears to me that he was quite right, and, as I understand it, it amounts to this, that, although when you once establish the fact of actual substantial damage, it is quite right and legitimate to have recourse to scientific evidence upon the question of the causes to which that damage is to be referred, yet if you are obliged to start with scientific evidence, such as the microscope of the naturalist, or the tests of the chemist, for the purpose of establishing the damage itself, that evidence will not suffice; there must be actual damage, capable of being shown by a plain witness to a plain common jurymen." In further illustration of this point, the Lord Justice said: "The damage also must be substantial, and it must be in my view actual, that is to say, the court has no right whatever, in dealing with questions of this kind, to have regard to contingent, prospective or remote damage. I would illustrate this by analogy. The law does not take notice of the imperceptible accretions to a river bank, or to the sea shore, although, after the lapse of years, they become perfectly measurable and ascertainable, but if, in the course of nature, the thing itself is so imperceptible, so slow, so gradual, as that it requires a great lapse of time before the results are made palpable to the ordinary senses of mankind, the law disregards that kind of imperceptible operation. So, if it were made out that every minute a millionth of a grain of poison were absorbed by a tree, or a millionth of a grain of dust deposited upon a tree, that would not do, although, after the lapse of a million minutes the grain of poison or the grain of dust could be easily detected. It would never have done, as it seems to me, for this court in the reign of Henry VI. to have interfered with the further uses and extension of sea coal in London, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria, roses, both white and red, would have ceased to blow in the Temple. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruit of it should be the sights and sounds and smells of a common seaport and shipbuilding

town, which drive the dryads and their masters from their loved solitude."

*Legitimacy—Presumption of—Marriage—Reputation.*—*Lyle v. Ellwood*, 44 L. J. R. (N. S.), Chancery, 164. This was a suit for the administration of the estate of Mary Rosser, who died intestate on the 15th of February, 1870; and the sole question in dispute was whether John Ellwood and James Ellwood were (as they alleged that they were) the legitimate children of the intestate's grandfather, John Ellwood, by his second wife. The facts in evidence were that in 1770, John Ellwood married Mary Gibson, his first wife, at Whitehaven, in Cumberland, by whom he had children. In 1794 this wife died. He then lived with Sarah Campbell until 1816, and had by her two children who were christened John Ellwood and James Ellwood. The entry in the register of the birth of John gave the mother's name as Sarah Campbell, and the entry of the birth of James describes the mother as late Campbell. *John Ellwood and Sarah Campbell lived in Scotland during the larger part of the time they cohabited.* There was evidence that John Ellwood and Sarah Campbell were regarded as husband and wife, and a marriage was reputed and believed to exist, generally, by those who knew them. The children by the first marriage, in their letters to James Ellwood, had spoken of Sarah Campbell as the wife of John Ellwood.

It was uncontradicted that John Ellwood and Sarah Campbell, from the beginning to the end, always lived together, or, in other words, cohabited continuously, the first fourteen or fifteen years having been spent in Scotland, where it was competent to them to contract a marriage by cohabitation and habit and repute.

In deciding the case the Vice Chancellor cited, among other authorities, *Goodman v. Goodman*, 28 L. J. R. (N. S.), Chancery, 745, and stated the following as the law applicable to the case at bar, as derived from Lord Cranworth's opinion in *Campbell v. Campbell*, Law R. 1 Scotch App. 182.. "The great facility which the law of Scotland affords for contracting marriage, has given rise to rules and principles which

have been sometimes considered peculiar to that law. By the law of England, and I presume, of all other Christian countries, where a man and woman have long lived together as husband and wife, and have been so treated by their friends and neighbors, there is a *prima facie* presumption that they really are and have been what they purport to be. If after their deaths a succession should open to their children, any one claiming a share in such succession as a child, would establish a good *prima facie* case by showing that his parents had always passed in society as man and wife, and that the claimant had always passed as their child. If the validity of the parents' marriage should be disputed, it might become necessary for the person claiming as this child to establish its validity; and inasmuch as in England all marriages are solemnized in public, and publicly recorded, it is reasonable to require the claimant to give positive evidence of its celebration, or else explain why he is unable to do so. The principle is the same in Scotland; but as marriage there is not necessarily celebrated in public or recorded, it is much more probable than it would be in England, that there may have been a marriage, but there may be no means of giving direct proof of it. Those who have to decide, after the death of the parents, on the legitimacy of children, must, much oftener than in England, have to rely solely on the *prima facie* evidence of the conduct of the parties towards one another, and of their friends and neighbors towards them. This sort of evidence is spoken of in Scotland as 'habit and repute.' Persons are sometimes said to be married persons by habit and repute. I agree, however, with the argument of the appellant, speaking with deference to those who think otherwise, that this is an inaccurate mode of expression. Marriage can only exist as the result of mutual agreement. The conduct of the parties and of their friends and neighbors, in other words, habit and repute, may afford strong, and in Scotland, according to the law of marriage there existing, unanswerable evidence that at some unascertained time a mutual agreement to marry was entered into by the parties passing as man and wife. I can not, however, think it correct to say



that 'habit and repute' in any case make the marriage. Repute can obviously have no such effect. It is, perhaps, less inaccurate to speak of habit creating marriage, if by the word 'habit' we are to understand the daily acts of persons living together, which imply that they consider each other as husband and wife, and it may be taken as implying an agreement to be what they represent themselves as being. It appears to me, however, even here, to be an improper use of the word to say that it makes marriage. The distinction is, perhaps, one rather of words than of substance, but I prefer to say that habit and repute afford by the law of Scotland, as, indeed, of all countries, evidence of marriage always strong, and, in Scotland, unless met by counter-evidence, generally conclusive."

Agreeably with this statement of the law, the Vice Chancellor declared the marriage valid, and John and James Ellwood legitimate children of John Ellwood.

*Injunction—Libel—Jurisdiction.*—The Prudential Assurance Company v. Knott, 44 L. J. R. (N. S.), Chancery, 192. The Lord Chancellor's decision. The Court of Chancery has no jurisdiction to restrain the publication of a libel, even when its publication will be injurious to property or reputation. Dixon v. Holston (L. J. R. 7 Eq.), disapproved.

## II. COMMON LAW.

*Marine Insurance—Policy on Goods—Implied Warranty by Assured—Seaworthiness—Loss by Perils of the Sea—Ship sinking in Harbor from Unknown Cause.*—Anderson v. Morice, 44 L. J. R. (N. S.), Common Pleas, 10. This was an action brought to recover upon a policy of insurance signed by the defendant for indemnity in respect of a cargo of rice. On the 2d of February, 1871, the plaintiff entered into a contract to buy "the cargo of new crop Rangoon rice, per Sunbeam, at 9s. 1½d. per cwt., cost and freight." The ship Sunbeam did not belong to either the seller or the plaintiff; she was chartered by the seller's agent to proceed to Rangoon to ship and carry a cargo of rice to any port in the United Kingdom or on the continent. On the 3d of February, 1871, the plaintiff effected insurance with the defendant at and from Rangoon to

any port or place of discharge in the United Kingdom or Continent, by the Sunbeam, on rice. The said merchandises are and shall be valued at 5,500l.

The Sunbeam arrived in the Rangoon river on the 3d of March, 1873, and began to load a cargo of rice. On the 30th of March, whilst lying at anchor in the river, she sprang a leak from an unknown cause, and sunk in the course of the night. At the time of the foundering the Sunbeam had not finished loading; both the ship and the portion of the cargo on board were totally lost. Before the 30th of March the vessel had been quite free from leakage, and had performed several long voyages, behaving extremely well; she had also been examined whilst lying in the river as to her caulking, which was found in good condition. *Held*, that upon the above facts there was evidence that the Sunbeam was seaworthy when the risk under the policy attached, and that she had been lost by perils of the sea, and held further, that the plaintiff at the time of the loss had an insurable interest in the rice on board the ship.

*False Pretenses and Ready-Money Payment for Goods—Payment by Cheque on Banker—No Assets—Colorable Account—24 and 25 Vict., ch. 96, s. 88.*—The Queen v. Hazelton, 44 L. J. R. (N. S.), M. C. 11. A man who makes and gives a cheque for the amount of the goods purchased in a ready-money transaction, saying that he wishes to pay ready-money, makes a representation that the cheque is a good and valid order for the amount inserted in it; and if such person has only a colorable account at the bank on which the cheque is drawn, without available assets to meet it, and has no authority to overdraw, and knows that the cheque will be dishonored on presentation, he may be convicted of obtaining such goods by such false pretence.

*Railway Company—Loss of Passenger's Luggage—Condition that Company shall not be Responsible for Loss arising off its Lines.*—Kent v. The Midland Railway Company, 44 L. J. R. (N. S.), Q. B., 18. This was an action for the loss of the plaintiff's luggage, which had been delivered to the defendant as carriers. The facts are these: The plaintiff took a

ticket as a passenger to be conveyed from Bath to Chester. From Bath to Chester you travel by two lines of railway by the Midland Railway as far as Birmingham, and from thence to Chester by the London and North Western Railway. The passenger with his luggage was safely conveyed as far as Birmingham. At the latter place, the platform to which the trains came in from Bath, and from which the other line issues, belongs to the London & N. W. R. Co., but by the terms of the agreement between that company and the Midland Railway Company, the latter company were entitled to the use of it, and to the service of the porters of the L. & N. W. R. Co., in like manner as if they were their own servants, in consideration of an annual payment. The luggage was taken out of the carriage at the Birmingham station by one of the porters acting in the service of the N. W. R. Co., though the Midland Co., were entitled to his service by virtue of the agreement before mentioned, and it was by him taken across the platform towards the carriages of the L. & N. W. Co., and whilst being so carried on a truck it was seen by the plaintiff; but it was not seen by the plaintiff or any one else in a carriage belonging to the L. & N. W. Co., and it did not appear that it ever was delivered into its custody. The ticket purchased by the plaintiff had on it these words: "This ticket is issued subject to the regulations and conditions stated on the company's time tables and bills," and there were notices in the booking office, and also on the company's time tables to this effect. "The company does not hold itself responsible for any delay, detention or other loss or injury whatsoever, arising off its line, or from the acts or default of other parties." The plaintiff took no notice of the condition on the ticket, and never saw the time tables or bills.

The luggage was missed by the plaintiff when the train reached Stafford, on the line of the L. & N. W. Co. The Midland Company was sued and for its defense relied upon the stipulation that it would not be responsible "for any delay, detention or other loss arising off its line." *Inter alia*, Lord Cockburn said: "Now, in the strict words of the contract the plaintiff's luggage at the time it was last seen was

'off the line' of the Midland Co., but we must give the contract a reasonable intendment, and understand by 'off their line,' 'out of their custody.' It was part of the agreement of the Midland Company not only to convey the plaintiff and his luggage in their carriage from Bath to Birmingham, but furthermore to convey his luggage from that part of the platform at which goods were landed from their carriages to the carriages of the L. & N. W. Co., and to deliver it safely out of their own custody, into the custody of the L. & N. W. Co. The plaintiff's luggage when last seen was not, I think, out of the custody of the Midland Company, for this reason, that they were bound to have it conveyed to the carriages of the L. & N. W. Co., and for that purpose they were entitled to the service of the porters of the latter company, who must, for the occasion, be taken to be their own servants. Holding the words 'off their line' as equivalent to 'out of their custody,' and the luggage not being shown ever to have been out of their custody at the time it was last seen, I think the company fail to establish that the case is within the exception, and that they are liable for the loss."

*Attachment of Debt—Garnishee Summons—Power to go into Account between Judgment Creditor and Garnishee—Common Law Procedure Act, 1854—(17 and 18 Vict., ch. 125), S. S. 61, 63.—In re Sampson, judgment creditor; the Seaton & Bur. Railway Co., judgment debtors; The London & Southwestern Railway Co., garnishees, 44 L. J. R. (N.S.) Q. B., 31. The garnishee had a claim for freight against the judgment creditor, which it sought to deduct from the fund garnished, and to do this asked the court to settle the amount between it and the judgment creditor.*

It was held by Lush, J., that in this proceeding the judge should decide whether the judgment creditor should have judgment against the garnishee, and for this purpose he may and ought to consider the state of accounts between the garnishee and the judgment debtor, but he can not go on to settle accounts between him and the judgment creditor, nor impose as a condition to the statutory remedy that the judgment creditor shall pay what he may owe the garnishee.

*Damages—Reduction of.*—*Bradburn v. The Great Western Railway Co.*, 44 L. J. R. (N. S.), C. P., 9. The damages in an action for negligence causing personal injury to the plaintiff are not subject to any deduction therefrom, of money paid to him by an insurance office under a policy of insurance against accidents, as compensation for the same injury.

*Cost of Paving New Street—Owner of Soil in Roads abutting a street—Conveyance not passing Land ad medium Filum Viæ.*—The defendants in this case, being the owners of land, laid it out for building purposes, and made roads and ways upon and across it communicating with certain ancient highways outside the land. They then sold the land in lots to different purchasers, and conveyed it to them by metes, bounds and admeasurements, set forth on a plan annexed to the conveyance, upon which each lot was numbered. Each lot had a frontage upon one of the roads, and in the conveyance was stated to be situated upon the side of and adjoining such road, but neither the measurements nor the coloring of the plan on the conveyance included any part of the road, and each lot was in the plan separated from the road by a line. The roads so set out were dedicated to the public so far as the defendants could, by any act of theirs, dedicate the same. Part of the roads, when built upon, became streets, and the plaintiffs, the board of works of the district within which the land was situate, paved and improved the streets, under the Metropolitan Local Management Acts, 18 and 19 Vict., c. 120, s. 105, and 25 and 26 Vict., c. 102, s. 77, and apportioned the cost, assessing the defendants in respect of the streets and roads bounding or abutting on the sides or ends of the streets paved. The 18 and 19 Vict., c. 120, enable the board to charge the paving and repairing of streets to the owners of houses. In the 250th section the word owner is defined to mean the person for the time being receiving the back rent of the land or premises, or who would receive the same if such land or premises were let at back rent. Chap. 102 of 25 and 26 Vict. provides that the owners of land as above defined, bounding or abutting on such street, are made liable to contribute to the expense of paving it. The 77th section contains

this provision: "Any such costs or expenses, including the cost of paving at the point of intersection of streets (that is when neither the land nor houses bound or abut the street), and all incidental costs and charges shall be apportioned by the vestry or board, and shall be recoverable either before the work shall be commenced or during its progress or after its completion." It was held, 1st, that it was evident from the conveyance that there was no intention to pass the soil of the road *ad medium filum viæ* to the purchasers of the lots; and 2d, that the roads were not, within the meaning of the act, land bounding or abutting on the streets which they meet or intersect, and, therefore, the defendants were not liable to contribute to the expenses of paving such streets. *Northbrook v. The Homestead Board of Works*, 41 L. J. R. (N. S.), M. C., 51, distinguished.

### III. PRIVY COUNCIL APPEALS.

*Jurisdiction of Civil Courts in Ecclesiastical Matters in Lower Canada.*—*Henrietta Brown v. The Curate and Church Wardens of Montreal*. 44 L. J. R. (N. S.), Privy Council, 1. This was an appeal from the judgment of the Court of Queen's Bench of the Province of Quebec, Canada, confirming a judgment of the Court of Review, which latter reversed a judgment of the Superior Court in first instance. The question which was the subject of these different judgments, related to the burial of the remains of Joseph Guibord, one of Her Majesty's Roman Catholic Subjects, who died at Montreal in 1869. The suit on behalf of the representative of Guibord was for a mandamus to "Les Cure et Marguilliers de l'œuvre et Fabrique de Montreal," upon receipt of the customary fees, to bury his body in the parochial cemetery of members of the Roman Catholic Church at Montreal, entitled the Cemetery of La Cote des Neiges, conformably to usage and to law, and to enter such burial in the civil register. "La Fabrique de Montreal," is a corporation consisting of the cure and certain lay church officers called Marguilliers, whose relation to the church and churchyard is analogous to that of churchwardens in an English parish. The corporation manages the temporalities of the church, which temporalities are also

sometimes designated by the title of "La Fabrique." "La Fabrique de Montreal" had the control of this particular cemetery. Guibord was a lay parishioner of Montreal. He was both by baptism and education a Roman Catholic, which faith he retained up to the time of his death.

In the year 1844 a literary and scientific institution was formed at Montreal for the purpose of providing a library, reading room, and other appliances for education, and was duly incorporated by a provincial statute, under the name of the *Institut Canadien*. Guibord was one of the original members of the Institute.

In the year 1858 certain members of the Institute proposed a committee for the purpose of making a list of books in the library, which, in their opinion, ought not to be allowed to remain therein. An amendment, however, was carried by a considerable majority, to the effect that the Institute contained no improper books, that it was the sole judge of the morality of its library, and that the existing committee of arrangement was sufficient. In the library of the Institute were books which were in the Index Expurgatorius at Rome.

A pastoral was published by the Bishop of Montreal calling attention to this fact and the errors into which the majority of the members had fallen, citing the council of Trent as authority, and appealing to the Institute to alter the resolution, otherwise no Catholic would continue to belong to it. The resolution was not rescinded. In 1865 several of the Roman Catholic members of the Institute, including Guibord, appealed to Rome against this pastoral. They received no answer to their application. But in the year 1869 the Bishop of Montreal issued a circular "publishing the answer of the Inquisition concerning the *Institut Canadien*, and the decree of the Holy Congregation of the Index condemning the 'Annuaire' of the said institute for 1868." This circular was dated from Rome, 16th July, 1869. He also sent a pastoral letter from Rome, dated August, 1869, which contained two inclosures; one the sentence or answer of the Holy office, and the other a *Decretum* of the Congregation to whom the case of the Index was committed.

This *Decretum* specially recited the fact that certain books, naming them, contained in the library of the Institute, were in the Index and condemned, etc., and forbade two things: 1st. To belong to the Institute while it taught pernicious doctrines. 2d. To publish, retain, keep or read the "Annuaire" for 1868. And the bishop also pointed out that any person who persisted in keeping or reading the "Annuaire," or in remaining a member of the Institute, would be deprived of the Sacrament, "meine a l'article de la mort." Guibord remained and died a member of the Institute. Upon application to him therefor, the cure, by order of the bishop, refused to permit "la sepulture ecclésiastique" to Guibord.

On the 23d of September the widow presented a petition to the Superior Court setting out the facts, and prayed that a mandamus might issue as above stated. A writ of summons was issued, calling upon the defendants to appear and answer the demand which should be made against them by the plaintiff, for the causes mentioned in the petition. Defendants appeared and filed several pleas, the third of which was deemed material. It averred in substance that the service (culte) of the Roman Catholic religion in Canada is free, and the exercise of its religious ceremonies, of whatever nature, is independent of all civil interference or control; that, for the purpose of assuring the freedom of that religion, the law recognizes the respondents as proprietors of the Roman Catholic parish church of Montreal, and of its parsonage, cemeteries, and other dependencies, which are all Roman Catholic property, devoted to the exclusive use and exercise of that religion, and subject to the exclusive control and management of the respondents, and of the superior Roman Catholic ecclesiastical authority; that the respondents, in such capacity, had for more than ten years been proprietors and in possession of the Roman Catholic cemetery in question, and are empowered by law to point out the precise spot in the cemetery where each burial is to be made; that, besides their above mentioned capacity, the respondents are also civil officers within certain limits, having to fulfill certain civil duties defined by law, and are legally responsible in that capacity



and sphere only; that the respondents, in their double capacity thus existing, are, by the Roman Catholic religious authority and by the law, set over the burial of persons of Roman Catholic denomination dying in the parish of Montreal, and are responsible to the religious and civil authorities, respectively, for the religious and civil portions of such functions; that the respondents, for the execution of their double duty, and in accordance with the immemorial custom of the Roman Catholic parishes throughout the country, have assigned one part of the cemetery for the burial of persons of Catholic denomination and belief, who are buried with Roman Catholic religious ceremonies, and another part for those who are deprived of ecclesiastical burial; that Joseph Guibord was a member of a literary society at Montreal, called the Canadian Institute, and as such was, at the time of his death, and had been for about ten years previous, notoriously and publicly subject to canonical penalties resulting from such membership, and involving deprivation of ecclesiastical burial; that immediately after the death of Joseph Guibord, the Rev. Victor Rousselot, Roman Catholic priest, and curate of the parish of Montreal, submitted the question of his religious burial to the Rev. Alexis Frederic Truteau, vicar-general of the Roman Catholic diocese of Montreal and administrator of the diocese, with supreme ecclesiastical authority therein in the absence of the bishop, by virtue of the rescript of the pope, dated the 4th of October, 1868; and that the said administrator replied by a decree declaring that, since Joseph Guibord was a member of the Canadian Institute at the time of his death, ecclesiastical burial could not be granted to him; that the plaintiff, by her agents, having required M. Rousselot and the respondents to give to the body both religious and civil burial in the cemetery in question, they repeatedly informed the said agents of such decree of the administrator of the diocese; and that in consequence thereof, ecclesiastical burial could not be granted and was refused, but that they were ready as civil officers to bury the remains civilly, and authenticate the death according to law, which offer was never accepted by the plaintiff or agents; and that, having re-

gard to the above facts, the plaintiff could not claim from the respondents for the remains of her late husband more than civil burial, and that, under the conditions laid down by the ecclesiastical laws of the Roman Catholic Church, which the respondents had never refused. The plea concluded by saying that the respondents, as civil officers, had not neglected or refused to perform any duty imposed on them by the law; and in fact had refused nothing but ecclesiastical burial, for the refusal of which they were responsible only before the religious, and not before the civil authority.

The plaintiff filed her answer. To the third plea she made three answers: The first, an answer in law or demurrer; the second, a general traverse in fact; the third, a special answer both in law and in fact.

The first answer stated that, by the French law existing in Canada at the time of the cession to Great Britain, the judicial authority representing the sovereign had jurisdiction to correct and prevent the abuses of religious authority in circumstances such as those which had given rise to this action; that the burial due to the remains of Joseph Guibord was a consequence of his civil status of Roman Catholic, and that as well since as before the cession, there is no authority in the country, independent of the state and the civil courts, in any matter affecting the rights of the subject; that the plea did not sufficiently state the canonical penalties alleged by it, and particularly did not show whether they had been pronounced against Joseph Guibord by name, a condition without which the plaintiff averred that they could not have the effect attributed to them by the respondents; and that since the Canadian Institute was incorporated by a public act of the Parliament of the late province of Canada, no authority but that of Parliament could restrict the liberties and franchises granted to its members by that act, and the plea, as tending to attribute to the bishop the right of restricting them, constituted an attempt against the authority of the sovereign.

The Quebec ritual which regulates the Roman Catholic Church in Lower Canada, provides that "ecclesiastical burial should be refused to those who may have been *excommunicata-*

*ted or interdicted by name*, unless before dying they shall have given signs of repentance, in which case ecclesiastical burial may be granted them after the censure shall have been removed by our orders, to public sinners (*pecheurs publics*) who have died in impenitence," etc. The respondents joined issue on the answers of the appellant, and also by leave of the court filed a special replication to the petitioner's third answer to the respondent's third plea, in which, after repeating that the civil courts were incompetent to question a decision of the ecclesiastical authorities on ecclesiastical matters, and could not inquire into the grounds upon which ecclesiastical burial had been refused to Guibord, they nevertheless cited the decrees of the council of Trent with regard to the Index, and the proceedings relating to the Institute, and concluded by an averment that in consequence of the premises, Guibord at the time of his death must be considered as "un pecheur public," and as such, obnoxious to the canonical penalties imposed by the Roman Catholic ritual, among which was privation of sepulture; that the members of the Institute having refused to obey the pastoral, and persisted in their refusal, the judgment of the Bishop, imposing the above mentioned canonical penalty, remained in full force and effect.

'It then avers that Guibord being a member of said Institute, the administrator had justly rendered the decree which deprived him of ecclesiastical burial, and that this decree rendered in the form in which it is found, should be regarded as a decree against Guibord by name. The Superior Court gave judgment for the widow on the merits, and ordered a peremptory writ of mandamus to issue.

There was an appeal to the Court of Revision, before three judges, who reversed the judgment of the court below, quashed the writ originally issued, and dismissed the writ of mandamus. From this judgment the widow appealed to the Court of Queen's Bench, which affirmed the judgment of the Court of Revision, and the case was then appealed by the widow or her representatives to the Privy Council. Upon the main question raised by the third plea the Privy Council decided,

1st. That by the act of cession, art. 27th, and the treaty of 1763, and the statute of 14 Geo. III, ch. 83 (passed 1774), sec. 8, although the Roman Catholic Church in Canada may, on the conquest, have ceased to be an established church in the full sense of the term, it nevertheless continued to be a church recognized by the state; retaining its endowments, and continuing to have certain rights (*e. g.*, the reception of "dimes" from its members), enforceable at law. \* \* \*

Even were this church regarded merely as a private and voluntary religious society, resting only upon a consensual basis, courts of justice are still bound, when due complaint is made that a member of the society has been injured as to his right in any matter of a mixed spiritual and temporal character, to enquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury.

In the case of *Long v. The Bishop of Cape Town*, 1 Moore P. C. (N. S.) 461, their lordships said: "The Church of England, in places where there is no church established by law, is in the same situation with any other religious body—in no better, but in no worse position—and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body, which will be binding on those who expressly or by implication have assented to them. It may be further laid down that, when any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, the decision of such tribunal will be binding, when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice."

2d. That forfeiture of the right to ecclesiastical burial may be legally incurred. But in the case at bar it was admitted that no sentence of excommunication was ever passed against Guibord, *nominatim*, by the bishop or any other ecclesiastical authority. No personal sentence, such as is contemplated by

the authorities of the church, was ever passed against Guibord. There was a letter called a *decret* of the Administrator-General to the cure, which, after referring to a letter of the bishop, refuses ecclesiastical sepulture to him as a member of the Institute. The representatives of Guibord were neither summoned nor heard. This so-called *decret* had none of the essential elements of a judicial sentence.

3d. That Guibord was not to be considered a public sinner (*un pecheur public*) within the terms of the Quebec Ritual. Rule X of the Council of Trent, which was relied upon to support this proposition, was held not applicable, inasmuch as France never recognized this authority. It did not appear that her Majesty's Catholic subjects in Lower Canada have consented, since the cession, to be bound by such a rule as it is sought to enforce in this case, which, in truth, involves recognition of the authority of the Inquisition, an authority never admitted, but always repudiated by the old law of France.

"The conclusion, therefore, to which their lordships have come upon this difficult and important case, is that the respondents have failed to show that Guibord was, at the time of his death, under any such valid ecclesiastical censure as would, according to the Quebec ritual, or any law binding upon Roman Catholics in Canada, justify the denial of ecclesiastical sepulture to his remains. It is, however, suggested that the denial took place, in fact, by the order of the bishop or his vicar-general; that the respondents are bound to obey the orders of their ecclesiastical superior; and, therefore, that no mandamus ought to issue against them. Their lordships cannot accede to this argument. They apprehend that it is a general rule of law in almost every system of jurisprudence, that an inferior officer can justify his act, or omission, by the order of his superior, only when that order has been regularly issued by competent authority. The argument would, in fact, amount to this: that even if it were clearly established that Guibord was not disentitled by the law of the Roman Catholic Church to ecclesiastical burial, nevertheless the mere order of the bishop would be sufficient to justify the cure and 'Marguilliers' in refusing to bury him in that part of

the parochial cemetery in which he ought, on this hypothesis, be interred ; or, in other words, the bishop, by his own absolute power in any individual case, might dispense with the application of the general ecclesiastical law, and prohibit upon any grounds, revealed or not revealed, satisfactory to himself, the ecclesiastical burial of any parishioner. There is no evidence before their lordships that the Roman Catholics of Lower Canada have consented to be placed in such a condition.

“ Their lordships do not think it necessary to consider whether, if the parties and circumstances of the suit had been different, they would or would not have had power to order the interment of Guibord to be accompanied by the usual religious rites, because the widow finally forewent this demand, and counsel at their lordships’ bar have not asked for it, and also because the cure is not before them in his individual capacity ; but they will humbly advise her Majesty that the decrees of the Court of Queen’s Bench and of the Court of Review be reversed. That the original decree of the Superior Court be varied, and that, instead of the order made by that court, it should be ordered that a peremptory writ of mandamus be issued, directed to ‘ Les Cure et Marguilliers de l’œuvre et Fabrique de Notre Dame de Montreal’, commanding them, upon application being made to them by or on behalf of the *Institut Canadien*, and upon tender or payment to them of the usual and accustomed fees, to prepare, or permit to be prepared, a grave in that part of the cemetery in which the remains of Roman Catholics, who receive ecclesiastical burial, are usually interred, for the burial of the remains of the said Joseph Guibord ; and that, upon such remains being brought to the said cemetery for that purpose, at a reasonable and proper time, they do bury the said remains in the said part of the said cemetery, or permit them to be buried there.”

### VIII. THE KING'S BENCH AND GROWTH OF THE LAW.

The papers, within a few weeks, have told us that the justices of the King's Bench held their last session upon the 6th of July last. That institution, venerable by age, illustrious by the names associated with its affairs, whose history goes back to days before the conquest, has, by the revolution of events, and the changes in the judicial policy of the realm, no longer a name or place within the consecrated precincts of Westminster Hall. An event so fraught with interesting associations, deserves something more than a passing remark, and may well fill a page in a journal dedicated to the progress and purposes of jurisprudence as a science. For two centuries and a half, the law, as enunciated from the King's Bench, was substantially our own, and even to the present time, the judgments of that court have commanded a respect here which was scarcely less marked than that which is paid to the utterances of our own judiciary. It can, therefore, hardly come amiss to devote a few moments to some of the more obvious thoughts and reflections which are awakened, as we contemplate the history of this ancient court, the men who have been its judges and its advocates, or even the suitors and their causes of which we read in the volumes of its reports.

With an unimportant variance in name, the Court of King's Bench had completed a cycle of a thousand years, when, in a spirit of reform, its name and its functions became merged in a broader and more comprehensive form of organization, and left only the memory of what it had been. And nothing could more palpably mark the changes through which the civil institutions of England have been passing, than the contrast which is shown by a comparison of her social condition at the close and the beginning of this cycle of judicial life.

We take in, by such a contemplation, at a glance, the entire course of English civilization as well as of our own, from the rude dwellings and wild manners of Saxon life, to the culture, wealth, arts and commerce of the England and America of our own day. And as we trace the steps and causes of this revolution, we are not at a loss to understand the part which the English courts, and especially the King's Bench, have taken in giving effect and consistency to every new advance in the progress of the age. Without attempting to enter into detail, it is enough that the period during which this court has been actively at work, covers almost the entire growth of the body of the English law, and that, at every stage of this growth, this court has borne an important part in giving it form and stability. In this way this court has helped to stamp the character of wise laws upon the social and political institutions of the entire nation.

In tracing out how this has been done, we find the combined operation of agencies which have been peculiar to the English people. While, to a limited extent, direct and positive legislation has supplied the demand for new laws, it has been chiefly upon the common or unwritten law, that the people have had to depend to keep pace with the growing wants which business, culture and a widening range of social and economical interests were developing. In framing the rules of this common law, so far as they took the form of commands of a superior, we find in them neither the edicts of the Roman præter, nor the "*leges*," nor "*plebiscita*" of the Roman people. These derived their force as well as their limitations, from what was written. Whereas, though the people were ultimately the real authors of the common law, it owed its form and efficiency to the judgment and interpretation of the courts. These might not, *a priori*, make rules like legislators, but they could and did, by study, by observation, and by knowing the will and the wants of the people, declare what they, the people, in whom was the sovereignty of the state, chose and intended to have as a rule of property and right. And to them moreover was tacitly delegated enough of this sovereignty, whenever called on to determine



questions coming under their cognizance, to give to those rules the sanction, with which, as a department of the government, their judgments were clothed. This was especially true of the Court of King's Bench, which, at first, was the actual as well as theoretic organ of the will and judgment of the king. The rules of the common law, therefore, when once expressed as the will of the people and manifested and declared through the court, became something more permanent even than an edict of the prætor, and, at times, even superseded, as we shall hereafter show, the letter of the written law itself. In this way, law, as a rule of action extending to the entire community, kept pace, in one form or the other, with their growing wants, while in its unwritten form, it often did not wait for the slow and lagging steps of formal legislation. Nor did it matter that this expression of the public will was manifested under different names and forms, such as usages and customs, ancient statutes retained only in memory, and the like. Nor was it necessary to its validity to assume that the people ever came together to compare opinions, or attempted to usurp the prerogative of those to whom the power of making laws had, in form, been delegated. It is enough, that for no considerable length of time, can a rule of law, however enacted, stand in the way of the intelligent will of any people, nor, on the other hand, will they suffer important interests to be sacrificed for the want of all necessary and reasonable rules to protect and promote them. Whatever effect, therefore, may be given to the action of courts in declaring, and, as it were, registering these rules, the occasional abuse of judicial power by wicked or incompetent judges, could have but a partial effect, at most, in breaking down or demoralizing any system of unwritten law; so that our interest in the Court of King's Bench as an organ and representative of the English law, need not be diminished or impaired, even if we find upon its roll judges of singular and exceptional infamy, among those of the most weak and time-serving creatures whom it was possible for royalty to clothe with the ermine of justice. It is a part of the interest to be derived from a contemplation of the history of this court, that such a

contrast with good and great men is to be found among the judges who have composed it. The rules of the common law were for remedies as well as rights; the security of property as well as the safety of person, and the means and facilities of business, as well as the enjoyment of the earnings which these bring; and though here and there violence and outrage may break through these rules, they retain their primitive hold in the hearts and judgments of the people. The fact that the same age could have produced a Hale and a Jeffreys, gives cause for hope that in the darkest hours, men may look for a speedy return of judicial light. In a nation whose traditional respect for law goes back to its first start into life, and the voice of the civil magistrate has a more potent sway in checking turbulence and disorder than the trained soldiery of an armed police, a history of the changes through which law, as an element of power, has been passing, while it has kept pace with the growth of the nation's wealth and influence, can hardly fail to interest the most casual inquirer. It serves as a clue to guide one in tracing the causes and sources of national power and prosperity. As we study it, we find it under one phase during the Saxon rule, and another under that of the Normans. A change again comes over it with the unity of the Anglo Saxon dynasty, and never is at rest till the reformation sloughs off its obsolete dogmas, and a spirit of free thought, in everything that concerns church or state, has found an utterance in the laws of a Puritan commonwealth. These were, in fact, only stages in that ceaseless progress of legal thought, through which the people of England have been aiming to reach the rank in social attainment, and the proud eminence of material prosperity where she now stands, ever since the dawn of Saxon jurisprudence and civilization. Not a little of all this might be traced in the dry and uninviting volumes of reported cases, wherein the body of the English law in its development since the days of the Norman kings may be traced in outline, since in them we read the terms and limitations under which her courts have registered and declared the new phases in which a nation's will has grown into the body of her laws. Indeed, the his-

tory of a nation's laws is a history of the nation. But for a work like this we have neither time nor space; our only object has been to show that the character of these laws does not depend so much upon the good or bad qualities of a people's judges, as upon the intelligence, spirit of enterprise and moral culture of the people themselves. A judge with a bad heart may often do injustice to an individual suitor without being able thereby to reach the stability of the law on which public justice, as a whole, rests. The very atrocities of injustice and cruelty under which the nation groaned during the administration of a Scroggs, a Jeffreys, and a Wright, as chief justices of the King's Bench, served, in the end, to fix more deeply and securely than ever the foundations on which a wise and merciful and humane code of law now rests, as well in England as in our own country. Few judges have been wholly bad even among the worst upon the roll of incumbents that stretches back as far as that of the King's Bench. Saunders, for example, with all his coarseness and low-bred vulgarity, rarely failed to decide equitably between man and man, when he had no personal ends to answer, by truckling to a poor-spirited and contemptible tyrant. And in the double nature of Coke, the bold and just judge made up for the sycophancy of the courtier.

We shall see how far these general remarks upon the mode of giving a vitality to the common law are justified, and how far its consistency and stability have been affected by the manner in which it has been administered, if we look somewhat more particularly at what may be called the personal history of the court of which we have been speaking. It originally derived much of its power in giving character and force to what it laid down as law, from being an emanation from royalty itself. The chief justice was second in authority to the king alone. In the subsequent organization of the courts, while this lost many of its subjects-matter of jurisdiction, it retained a precedence and general oversight of the other courts, both in civil and criminal matters, which gave to its judgments special claims to the confidence and respect of the public. Whatever, therefore, was published under its

sanction, was accepted as law, till, for some satisfactory cause, these judgments had been reversed. A place upon its bench naturally became an object of generous ambition, and commanded talent of the first order in the kingdom. This was especially true after the office had become permanent and independent in the time of William III. Still, it should be borne in mind that it was no proper function of these judges to *make* the law. Their office was to declare it, whether made by the people themselves, or published and declared by the forms of a constitutional legislature. And this may account for the fact, so remarkable when considered by itself, that amidst all the revolutions through which England has passed since the days of Alfred, its changes of dynasties, its days of anarchy, its protracted civil wars, its struggles between Catholic and Protestant, its church and dissenters, so little of retrocession can be detected in the history of the common law. Feudalism left only its traces in the terms it lent and the forms it bequeathed to the free institutions of the common law. Villenage and domestic slavery died at the hands of the unwritten law, and neither of these have been resuscitated by any attempted legislation. The people demanded that the lands within the kingdom should no longer be locked up from commerce by a legal interdict against alienation, and soon found means of practically setting them free by a resort to their courts. And a measure thus begun ere long found countenance through the action of Parliament in the statute of *Quia Emptores*. And even with all the reproach which has at times been cast upon the trial by jury, the people have clung to it through all the vicissitudes of their government, as among the noblest of the institutions which had come down to them from an age when the person of every free man was held sacred in the eye of the law. It was because, however the forms and incumbents of government might change, the people were the same, and their will continued to give to the laws the vitalizing principle that sustained them in their integrity.

The point at which we have been aiming and have endeavored to illustrate from the history of the King's Bench,

is, that the progress and improvement in the laws of a state, though mainly due to the people, depend, in fact, for their efficiency upon the judges of their courts. They act in this through their rulers, their law-givers, as they are called, but they do it far more by themselves, through the instrumentality of their courts. In retrospect, this power may, at first, seem to have been slight and feeble. But enough of the true spirit came down from the very Saxons whom they had conquered and made slaves, to make itself felt in the strongholds of the haughty Normans, to temper the feudalism through which they were robbing and oppressing the land. And when we reach the time of John and his successors, we find the Barons themselves borrowing ideas for a charter of English liberties, from thoughts which were rife there before a Norman had set foot upon the soil. And we might add, that it was thoughts like these, which continued to permeate the masses, till they culminated in the Puritanism of the commonwealth, and the revolution of 1688.

The severest struggle, perhaps, with which this spirit had to contend, before it was ultimately triumphant, was maintained against the very despotism to which, under the pressure of royal prerogative, the King's Bench itself was ready to lend its aid, in the days of Charles and James. It was a war of its judges against the rights and liberties of the people, by their personal attacks upon noble and high-souled men, but in which, however, the people were soon able to retrieve the ground they had lost. And one of the instrumentalities by which this was done, was the relieving of the courts from being any longer subject to the capricious will of the monarch, and leaving them free to *declare* the law, whether they read it in the statute book, in recorded precedents, or in the will and wants of the people. Traced to its sources, the law found its true origin in the requirements of business, and a regard for the peace, good order and well being of the state.

Will any one ask where, in the history of the English law, we find our facts upon which to base these propositions? We hardly need go beyond any considerable number of volumes of reported cases, either in England or our own country, to

discover how little of the learning of the law is made up of written statutes or their interpretations, compared with the rules and principles, enunciated from time to time by the courts, which make up the body of the common law. Take that class of mercantile contracts known as bills and promissory notes, by means of which so much of the business of every civilized community is transacted. A single treatise upon the subject, in use by the profession, covers more than a thousand pages, while the whole of the statute law upon the same topic, in Massachusetts, for example, covers less than three pages of her statute book. Illustrations multiply the moment we begin to enquire what the common law has done to supply the defects, and temper the spirit of legislation. We have already referred to what it did through the means of subinfeudation to set the lands of England free from the iron grasp of its feudal lords. When, afterwards, her titled aristocracy had locked up lands, to minister to the pride and power of certain families, the courts found out a way, by borrowing a hint from the *Cessio in Jure* of the Roman law, to give effect to the wishes of the people against this monopolizing spirit of the land-owners, to cut the knot which legislation had tied, and to lay open their lands to the wants of an incipient and growing commerce. The court proved itself stronger than the Parliament, when it found itself backed by the wants and necessities of the people. So, the whole system of trusts is built up by judicial construction, upon a statute which aimed to destroy that double ownership of lands which the courts by Tyrell's case rendered perpetual.

Sometimes, indeed, the courts of common law have found themselves mistaken in the rule which the exigencies of the people have seemed to require. The question has been again presented under a new combination of facts, and the error in a former ruling has thereby been detected, so that it often happens that the common law seems to have to modify or retrace its own action. But it is enough for our purpose, when attempting to recall the part which the King's Bench has had in carrying forward and giving shape to the elements of the English law, to remind the reader that the law has grown

and expanded with every stage of the growth and development of the power and wealth and civilization of the English people. The dullest apprehension need not be told that the common law of the days of the Edwards was not cognizant of even the conception of a thousand of the things which the law of our day regulates and protects. One would have to come down to the days of Holt and Mansfield before finding himself in *rappor*t, to borrow a word, with the most familiar rules of mercantile or commercial law, which are every day in use in every commercial center of England and our own country. We may not be able to read in these great and significant changes through which the business and social and economical life of the nation have been passing, the minuter steps by which its interests have been expanded and invigorated into life. But we greatly err, if, among the elements of that growth, scarce any will be found to have been more active or efficient than the pervading influence of the very laws which have borrowed their life from the exigencies of the hour, and found a spoken language in the judgments and decrees of the courts. It may not have been the conception of a single mind, and may only have been reached after the hints and suggestions of successive emergencies. But when once conceived, it has been brooded over and cherished till developed into a living principle. Such, however, is not the form which the conception of legal ideas takes, in the judgment of writers of distinguished consideration. Law, with them, is something more than a fact; it is a science; and in the language of one, "The science of law is the qualitative and quantitative prevision of the existence and sequence of legal phenomena, and of their co-existencies and co-sequences, with other classes of phenomena." It may be so; but to some minds these terms might not convey a very definite idea of the manner in which the common law is to be sought or studied. It may have its metaphysical side and qualities to some minds, but to others, its single concrete form consists in the ultimate outgrowth of the people's will. If they need a law and wish it, they will have it, and if it come not as a statute, it will spring up and take root as a part of the broader

common law. The character as well as life of these new elements of law, are consequently borrowed from the occasion which discloses a new want, and not from any *a priori* fitness of some abstract rule. Circumstances dictate the rule; courts only formulate and make it known. England had no commercial law in fact, till she began to have ships and trade, and the interchange of commodities. She did not change her law of carriers by wagons and stage coaches, till she had her railroads and locomotive engines; she never settled how bargains might be made by telegraph, till men began to use its wires for the purposes of trade and business. And this her people, through their courts, did without the aid of Parliament. We have been treating of law as a palpable, practical science of collective and individual facts, and, as we look back over the history of the King's Bench for a thousand years, we are made to feel how much has been done by the members of the English courts and bar, in building up a noble, enlightened and far-reaching jurisprudence, second, if second at all, only to that of Rome at a parallel stage of her juridical history. It has felt the spirit of a progress in civilization, and has impressed itself upon the character of the nation itself. It was brought by our fathers to these shores as a part of their heritage of national thrift and freedom.

And the history of the King's Bench is a part of the history of our own cherished institutions. We owe our common law, like that of England, in the language of another, "to the growth of knowledge and the struggle of virtuous patriots, many of whom have fought and bled and died for it. We owe it to fortunate occasion, and to favoring Providence."

We have spoken of the judges of the King's Bench, and might, with equal propriety, have spoken of its barristers, and the part they have taken during that long period which has just closed upon that venerable court. Names illustrious for learning, eloquence, and fidelity to the cause of law and liberty, have lent dignity and honor to the English bar, and their memory is alike cherished by every American who has studied the history and character of our own institutions. It is when such men as Somers and Erskine and Romilly stand



up in the courts of justice against wrong and error and the abuse of power, that the public feel and understand that law, like peace, has its triumphs, more honorable than those that follow in the track of war. In this hundredth year since we ceased to claim an integral interest in the King's Bench of England, it seemed a fitting occasion to add to our centennial notices of events to be commemorated, the suggestive fact, that its history, too, is now among the things that are past.

EMORY WASHBURN.

CAMBRIDGE, MASS.

## IX. THE FEDERAL COURTS.

*Justitia præcipit parcere omnibus consulere generi hominum, suum cuique reddere, sacra, publica, aliena non tangere. Cicero, de Repub. 3. 12.*

Complaints of the tardy administration of justice in the Supreme Court of the United States have, it seems, been frequently heard in different parts of the Union. Appeals and writs of error are said to remain undecided for two and even three years, notwithstanding the prolongation of the terms of the court for months beyond the usual period, owing to the great mass of business before it.

Were the complaints confined to this enunciation, the only answer required would be to show that the judges of the court are laborious, and do all in their power to discharge their duty, and if delays nevertheless occur, it behooves the legislature and not the court to remedy the evil.

But it is further asserted, that in consequence of this state of facts, the court, in its anxiety to dispose of the business before it, renders hasty and ill-digested decisions, not only deficient in precision, but contrary to established precedents; that many of its judgments are expressed in terms sometimes obscure, and often inaccurate; that sufficient time is seldom allowed the judges to confer on the judgments that should be rendered, and hence, there are dissenting opinions in nearly all important cases, which tend greatly to impair the influence of the court in public opinion, and they presuppose either the absence of harmony among the members of the tribunal, or a want of concert of action and maturity of deliberation, which greatly injure the respect and confidence to which the highest tribunal in the land ought to be entitled.

This portion of the charges against the court we propose hereafter to examine, and shall, for the present, confine ourselves to the question of delay.

That this complaint is well-founded does not admit of a

doubt, since it has not only been acknowledged, but insisted on by one of the associate justices of the court, and a remedy suggested, which Congress partially adopted. We refer to an article by Mr. Justice Miller, in the *United States Jurist*, a quarterly law magazine, published in the city of Washington by W. H. & O. H. Morrison, in January, 1872, in which that able judge has briefly explained the condition of the docket of the Supreme Court, and suggested some reforms which would, to a certain extent, abridge the delays complained of.

In this article he says: "The court has, for many years past, been about two years behind its docket. That is to say, though there may have been at the close of each term some cases reached in less than two years from their being placed on the docket, it is still true that, take them altogether, more cases fail to reach the first call on that docket within two years from the time the record is filed in the court, than are called inside that period." (p. 2.)

He further declares, that "it may be fairly and safely affirmed, that an average period of three years elapses in cases appealed to the Supreme Court, between the time the judgment is rendered in the court below, and the time it reaches the court again for execution" (p. 3.); and he adds, "This does not look like speedy justice." He then proceeds to show that "the court now decides three or four times as many cases as the same court did decide forty years ago under Marshall, Story and their associates," and he maintains "that the judges of the court are in no sense to blame for this," and adds, "It is believed that they sit more hours in the day, and more days in the year to hear arguments than any appellate court in the United States, besides the duty which they are by law compelled to perform on the circuit;" and from this he concludes, "that the only remedy that can be found for the present delay, and for preventing its certain future increase, must be sought in the legislature." He is also of the opinion that a greater number of judges, would rather impede than expedite the business of the court, and he adds, "This court has never pursued the practice, so common in other appellate courts, of distributing the cases among its members,

and leaving the judge to whom the case is allotted to write his opinion and present it to the court for approval. Nor do they, as this mode of business often requires, take the cases home for a vacation to write their opinion. May it be long before they adopt either of these practices."

It is clear that *the facts* above set forth must be taken as true; how far they justify the conclusion, that the judges are *in no sense* to blame, we reserve to be hereafter examined.

The judge then proceeds to offer a few suggestions as to what the legislature may do in order to remedy the evil. The changes he proposes are: 1st. To dispense the Supreme Court from entertaining appeals from the District of Columbia and from the territories. 2d. To relieve the court from examining the facts in admiralty cases, and abolishing appeals *eo nomine* and compelling appellants in such cases to resort to a writ of error. 3d. He proposes that a similar rule should be adopted in chancery cases; and 4th, he suggests that the amount entitling a party to appeal in civil cases should be increased from \$2,000 to at least \$5,000.

We believe that the 2d and 4th propositions are the only ones which have, as yet, been adopted by Congress, and that it is this legislation which has directed the attention of the public to the examination of the subject.

The present is, probably, as suitable a period as any for the examination of the question, as to what should be done to render the administration of justice in the Supreme Court of the Union more prompt and efficient. More than ten years have elapsed since the civil war ended. Slavery, "*the broadest, foulest blot*" on the American escutcheon, is effaced. Four millions and a half of freemen have acquired the right of being represented and have their voice heard in the deliberative assemblies, as well as the courts of the nation. A period has arrived somewhat similar to that described by *Royer Collard* in the introduction to the "*Lettres sur la Cour de la Chancellerie d'Angleterre, par M. C. P. Cooper*," where he says: "An uninterrupted movement constantly renews all that surrounds us. Generations continually follow, without resembling each other, and their habits and wants necessarily

change as they do ; but in the midst of these incessant variations, there is one institution, which, by its very nature, is more effectually protected from the revolutions to which the rest are subject ; and that is the *judiciary*. The body entrusted with the administration of the law always stands in need of something immutable, like justice itself ; hence its attachment to antiquated and sacramental forms, which are retained, although useless, and which perpetuate habits that should be corrected. There arrives, however, a period when the necessity of reform is felt, and when we perceive too late that because we have neglected successive and almost imperceptible amendments, it becomes necessary to effect a complete change. Then it happens that we destroy and reorganize ; labor without reflection and a correct appreciation of the object to be effected, and form institutions that offer no guaranty of their stability."

We do not pretend that these observations apply exactly to our present situation ; but they emanate from a man who, for many years, was considered one of the ablest lawyers, statesmen and publicists of Europe, and they refer to a judiciary system which still exists in France, and many features of which resemble our own.

We hold, that law *as a science*, has made little or no progress since the times of Justinian. As *an art* it has unquestionably undergone important changes, and is still subject to constant mutations, but it is often doubtful whether the legislative enactments and judicial interpretations of the law and the mode of bringing them to an issue have not had a tendency rather to embarrass and obscure the attainment of justice, than to facilitate the speedy and just decisions of controversies. If the number of law books necessary to be consulted in order to understand the Roman law prior to the formation of the *Corpus Juris Civilis* of Justinian would have been sufficient to load several camels, it may be safely asserted that all the camels that traverse the Steppes of Asia or Africa at the present day, would be unable to carry the law books which now encumber the public and private libraries of the United States. And yet the principles of law are immutable,

at least in the abstract, and so far as they apply to social man. "*Honeste vivere, alterum non lædere, suum cuique tribuere,*" were from the beginning, are now, and ever will be, the rules that must govern every well-regulated community. But the application of these rules to social man presents innumerable difficulties and varies with the country, the institutions, the character, the physical and intellectual development, religion, climate, etc., of the inhabitants on which the laws are to operate. Hence the jurisprudence of every nation has some intrinsic peculiarities which distinguish it from all other nations, and in this respect the institutions of the United States are prominently conspicuous and have long excited the admiration and envy of the people of Europe.

There has unquestionably been a large class of our citizens possessed both of wealth, intelligence and political influence, whose frequent intercourse with Europe, and sojourns in the capitals of that country, have acquired a taste for the aristocratic distinctions which birth and wealth there bestow, and who would wish something of the same kind to be introduced in America. To these persons, if any such are yet to be found, we would apply the rebuke of Paul Louis Courier to the first Napoleon, when he changed his title of First Consul to that of Emperor: "*Il aspire à descendre.*" Because being the first citizen of a great nation, then, unquestionably, the first on the continent of Europe, he coveted an ancient title of much less significance, which made him the youngest emperor and an object of derision to those whose fastidious follies he sought to imitate. So the title of *citizen of the United States*, if accompanied by worth, is a prouder title than any crowned head of Europe could confer; and we have the proof of it in the well-known fact, that when a young American, at the risk of his life, but contrary to the etiquette of the court of Vienna, saved the life of an Austrian princess, the attention paid to him, a mere plebeian, at court excited the murmurs of the Austrian nobility, which were not silenced until the emperor declared, that he regarded an American gentleman as equal in rank to any of his nobles.

It is to be regretted that in an age in which human activity

seems to be directed to every art calculated to increase the physical well-being of all classes, where the means of intercourse and communication of every kind by land and water have so prodigiously extended, so little attention has been paid to the improvement of the law.

This does not mean that no attention is paid to legislation, for, in addition to Congress, we have thirty-nine legally authorized legislatures, which hold regular sessions, usually every year, and which, *more Americano*, cherish abundance; and in consequence seldom neglect to enact laws to suit the occasion at one session, repeal or modify them at another, then re-enact them, and so continue to frame codes of laws. The mere indexes and abridgment of their legislation to the present time would form thousands of volumes.

These laws, thus enacted, repealed, and modified, and re-enacted, must be applied to the infinite variety of affairs which engage the attention and form the pursuits of a highly intelligent and enterprising people, tenacious of their rights, and resolved to maintain them at all hazards.

Litigation is the necessary consequence, and the reports of the decisions of the different states, and the elementary works published on different branches of the law, not counting monographs, reports of celebrated trials, etc., exceed tens of thousands, and we presume that no lawyer in the Union has a complete collection of them. Even public law libraries are deficient in this respect, and we are convinced that the law library of the Supreme Court of the United States, one of the best, and containing, as we have been informed, upwards of thirty-five thousand volumes, though under the surveillance of a competent bibliophile, is frequently enriched by old legal American publications not previously known.

But all contracts and transactions between parties litigant are presumed to be made, unless the contrary appear, in reference to the law where they were made, and intended to be executed. A contract of sale, exchange, or an obligation, etc., executed in New York, Minnesota, or California, is to be decided by the laws in force in those states at the time the parties executed the act or contracted the obligation, and suits

depending in the thirty-nine different states and eight territories of the Union, have frequently to be decided by the Supreme Court of the United States.

Let us admit that all the judges of the Supreme Court are in every way qualified, and possess all the capacity, probity, firmness, disinterestedness and love of justice, which is usually expected in and possessed by persons capable of discharging the highest judicial functions in the state from which they were chosen. We are also disposed to admit that they possess, besides a competent knowledge of the law, a general knowledge of the arts and sciences, history, and the rise and progress of the institutions of their own and foreign countries, all of which may be required on many occasions, in order to apply the law correctly to the facts of a case, and yet something more is required in order to discharge the exalted functions of their station.

In order not to be misunderstood, we distinctly declare that we view the changes to be effected in the administration of justice in the Supreme Court, not as a question of *expedients*, but as a *grave politico-legal inquiry*, requiring the most mature examination and involving considerations affecting the future welfare of this great Republic. No man, whatever may be his attainments, can, or ought to expect, that his views will be generally acceptable to the public, and all that he can reasonably hope and desire is, that having, according to his means, contributed to excite attention to the question, it will be examined by those whose leisure and acquirements enable them to do it more ample justice.

We are, for reasons which we are about to develop, opposed to mere temporary expedients, palliatives which have to be renewed from year to year, and which, instead of remedying, aggravate the evil. We do not controvert the position of Justice Miller, that as the court is now organized, an increase of the number of judges would rather retard than expedite the decision of cases.

The reason is obvious; the court never undertakes to distribute the cases among its members, nor allows a judge to take the record home during the vacation, in order to write out



his opinion to be read when the court meets again. From this we infer that after the cases have been argued, the judges in conference discuss the questions to be decided, and call on the judge whose views on the subject meet the approbation of the majority, to write his opinion, which is afterwards submitted to the court and modified to suit the views of the majority, if necessary, and becomes the final decision of the court. Those judges who either think the conclusions or the reasoning wrong, then explain their views, and if not accepted, if they deem them of sufficient importance, publish their dissent.

This is unquestionably the proper manner of conducting judicial deliberations, which is not the result of the division of labor, as explained by Adam Smith, but the concord of opinions arrived at after a free and open discussion, when the cause has been argued, and when no extraneous influence is likely to bias the conclusion arrived at, and which removes the pride of opinion, which ordinarily induces a man who has reduced it to writing to adhere to it with an obstinacy seldom overcome.

We remember to have heard a chief justice of a certain supreme court, whose duty it was to assign the cases argued among the judges, and who, in doing so, with commendable industry, reserved a large portion for himself, and always delivered elaborate dissenting opinions whenever he differed from the majority, naively express his conviction, that there being five judges composing the court and six contested cases fixed for each day, they would be able to dispose of thirty cases a week, by allotting six cases to each member of the court. The result woefully disappointed his expectations, for reasons which every lawyer can easily comprehend.

But while the mode of conducting the business of the court is commendable in this respect, it is certain that there exists a delay in the decision of causes that ought to be remedied.

"A good and speedy justice is the greatest benefit a government can confer, since that which is bad is ruinous, and brings in its train calamities always deplorable, and which benefit no one;" says the publicist already quoted.

To provide a permanent improvement of the defects of which the public complains, without impairing the dignity and usefulness of the court, while it diminishes its labors, is the problem we propose to solve.

The United States embrace at present, excluding the territory of Alaska, 1942 millions of acres, about one-half of which belongs to the government. At the time of taking the census of 1870, the arable land under cultivation was 189 millions, being less than one-tenth of the total area, and the population is eleven inhabitants to each square mile, while in Belgium it is 451, in England and Wales, 389, in Italy, 237, in Germany, 193, and in France, 150.

But the soil of the United States has more arable land than any portion of equal extent in Europe, and there is every probability that the population will reach in the next half century from 100 to 150 millions, and in the course of a few centuries ten times that amount.

In September 1787, when the present constitution of the United States was formed, and for some time afterwards, the population of the United States did not exceed three millions. In 1790, the year after the passage of the judiciary act, it amounted to 3,231,930, including 59,466 colored persons, and in 1870 it amounted to 38,558,371, and now it largely exceeds forty millions.

The total area of the United States, including the territory of Alaska, is said by most recent authorities to be 3,603,844 square miles, of which the Atlantic slope contains 637,100 square miles, and including the waters falling into the Gulf of Mexico from the West and East, about 957,567 square miles, while the area of the Mississippi valley is 1,237,311 square miles, and the remaining 1,468,966 square miles include the Pacific slope and Alaska. Without vouching for the accuracy of the above data, because foreign and domestic engineers differ in their admeasurements, they suffice for the purpose of showing that the march of population and political influence is towards the West, and that when the remaining territories are admitted as states into the Union, the West will acquire an overwhelming preponderance, and require that its wants be

attended to and its interests protected. That the march of political influence is always in proportion to the advance of population is too apparent to have escaped observation. From 1790, when the first census was taken, until 1820, Virginia was supposed to be the most populous state of the Union, and it was not discovered until the fourth census, that she was inferior in that respect to New York. From that time her star which had been a long time in the ascendant, began to decline, and though the talents of her statesmen still maintained her ancient reputation, her sceptre had passed away. Jackson, whose military career and firmness had rendered him popular, succeeded, with the aid of Pennsylvania and New York, to obtain the presidency for eight years, and we entertain no doubt that he could have been re-elected for a third term, had he desired it.

From this time onward, and owing to the almost exclusive attention of New York to her local affairs, and the intelligent perseverance and skill of the politicians of Pennsylvania, that state was enabled for some time to hold the balance of power, and by its vote to determine the result of the presidential election. None of her citizens, however, ever obtained the honor of that office until 1857, when James Buchanan was installed as President. The efforts then made to elect Douglas showed the immense influence of the West, and from that period till the present, Illinois has had the honor of furnishing two presidents.

Of the present judges of the Supreme Court, the chief justice and one associate justice are from Ohio, one is from Illinois, one from Iowa, one from California, one from Maine, one from New York, one from Pennsylvania, and one from New Jersey.

From this it is apparent that five of the judges, including the chief justice, are from the West; three from the middle states, and one from the New England states; and that Ohio now occupies the same relative position in the judiciary as Virginia did when Marshall was chief justice and Washington associate justice. Eleven Southern states have no representative on the Supreme Bench, and, in the progress of time

not very remote, we should not be surprised if all the judges were selected from the states lying north of the Ohio and west of the Mississippi.

The United States, embracing, as we have shown, an area exceeding three millions six hundred thousand square miles, embrace territories originally settled by or belonging to Spain, France, England, Holland, Sweden, Mexico, Russia, and the different aboriginal tribes which, from times immemorial, roamed over its surface, some of which have become civilized, while the rest are protected by special laws. If it be true, as has been repeatedly asserted, that the subjects of Great Britain, when emigrating to and settling in a new country, carried with them and introduced the laws of the mother country, this doctrine, if correct, must apply equally to the colonies of Spain and France, and if we are not much mistaken, special laws and treaties have not only recognized but enforced these principles. But the whole country north of the Ohio and west of the Mississippi, once belonged to France and Spain, at periods, it is true, more or less remote; and it may be useful, may be indispensable to understand some portion of the laws which then regulated their intercourse.

No one who possesses the slightest knowledge of jurisprudence will deny that it is a progressive science, varying with the wants and changes of society, and adapting itself to the forms it assumes, and intervenes to regulate and direct in a hundred different ways its progress in the arts, manufactures, commerce, etc.

That the jurisprudence of the United States has greatly changed in the last thirty years, is certain; and if Marshall, Story and Kent, could, like Rip Van Winkle, be resuscitated, and placed on the bench, they would be as much surprised as that worthy man when he awoke and returned to his home. The unprecedented increase of corporations, municipal and private; the extraordinary extension of railroads and telegraphs; the changes in our commercial and financial relations at home and abroad; the creation of national banks; the formation of an indefinite number of insurance companies, undertaking to protect against all possible risks; the establish-

ment of express companies; the adoption of a uniform bankrupt law, etc., etc., have so completely changed the aspect of the litigation in our courts that even Sir William Blackstone, with all his knowledge of common law, would be at loss how to apply it to acts which have assumed the form of commercial transactions, rather than the semblance of that venerable and austere form which so much pleased Lord Coke, and was so extravagantly praised by the author of the Commentaries on the Laws of England.

The foregoing being simply the prolegomena of what we have to say on the subject, we reserve for a future number the development of the plan we propose, and the thorough examination of the questions it involves.

There appears, however, to be cogent reasons, why the judges of the Supreme Court should be dispensed with sitting as judges in the circuit courts. Their doing so is not only an act of doubtful propriety, but the constitutionality of it has been seriously questioned, and we reserve the right to ventilate this, like all other reserved questions, in a future number.

Having sworn allegiance to no sect, and being affiliated with no political party, we have endeavored to examine the subject treated of impartially, and shall continue to do so in future.

GUSTAVUS SCHMIDT.

NEW ORLEANS, LA.

## X. THE BENCH AND BAR OF THE SOUTH AND SOUTHWEST.

Having heretofore made mention of that remarkable migration to the state of Mississippi of barristers from other states of the Union—a little anterior to the close of the fourth decade of the present century—and having also stated as one of the causes of this memorable aggregation of professional ability, the anterior purchase by the general government of that wide domain held by the Choctaw and Chickasaw tribes of Indians, it may not be amiss here to bring to view an additional cause of the flocking to this fertile and attractive region of such a prodigious number of attorneys in quest of fame and fortune, both of which, they had reason to hope, might be here acquired more easily than elsewhere.

When the stern and inflexible virtue of a sagacious and enlightened chief magistrate, the leading measures of whose eventful administration will long continue to attract the thoughtful and scrutinizing attention of his countrymen, interposed, by the heroic exercise of the veto power, an insuperable obstacle to the re-charter of the famous Bank of the United States, the noxious influence of which upon the politics and morals of an enterprising commercial people had begun to be painfully realized, the state banks existing at this period having been made the depositories of the money of the Federal government, were, in this new capacity, counselled in a manner which could not but prove effectual, to emit, as soon as possible, adequate amounts of their own paper circulation, to supply that deficiency in the accustomed medium of exchange expected to be realized, and save the country from the deleterious effects of an over-sudden *contraction* which might otherwise result from the rapid withdrawal of the issues of that huge institution which had so long dominated over all the concerns of trade and business. The vast amounts

of state bank circulation which soon inundated the land, imparted such a stimulus to moneyed enterprises of every description, and awakened such an extravagant spirit of speculation everywhere, and especially in the new cotton states of the southwest, that some check to this rapidly growing evil was deemed expedient, and the celebrated *Treasury Circular* made its appearance, which quickly brought on such monetary re-action, as to spread almost universal bankruptcy throughout a region where the hopes of countless wealth, beyond all that is told even in tales of romance, had become, by the action of the causes specified, almost universally diffused. Such a scene of distress, devastation and confusion as was now unfolded, no language could adequately portray. Universal loss of confidence ensued. The deposit banks were swept out of existence as by a whirlwind. All the state banks had been imitating their example in deluging the land with irredeemable paper, and had to share their fate. The commission merchants of New Orleans were compelled, in great numbers, to close their business houses, and call in the vast sums which they had been liberally supplying to their customers in the cotton-planting region, and upon which they had been realizing large commissions. The wholesale mercantile houses of the North and East, and who had sold enormous amounts of goods on credit to almost all who chose to apply for them, naturally enough participated in the general moneyed panic, and vehemently demanded of their numerous local customers the immediate payment of what was due them. This could, in general, only be effected by the general transfer of claims against those who had been dealing with them in a manner so extravagant as almost to indicate a supposition on their part that the day of payment would never come. The courts began to be filled with suits of almost every description. Rumors soon went abroad that lawyers in Mississippi were far too few in number to cope with the litigation in progress, and that many of them were rapidly accumulating over-grown fortunes. The effect of such intelligence as this was almost electrical; it was really almost like the letting loose of an avalanche from some lofty Alpine

height. Attorneys came in great numbers almost by every stage-coach which came into the state, and by every steamer which descended the Mississippi river. Many came only with an intention of sojourning in the land of promise for a short period, leaving their families behind them, whilst others came to take up a permanent residence. Many of these new comers were men of learning and worth, and deserved all the success which they afterwards achieved. If there were a few others of a different description, the fact is not at all to be wondered at. That, in such a state of things as has been described, too much avidity for the accumulation of wealth should have, to some extent, made itself apparent even among the members of the legal profession in Mississippi; that sometimes fees were demanded to an amount a good deal beyond the services actually rendered; and that there were instances of gross oppression in the collection of money by execution, should, perhaps, occasion no great surprise. That attorneys chiefly representing non-resident clients should have occasionally shown but little commiseration for debtors wholly unknown to them personally, was, perhaps, to have been expected; and that here and there large and valuable estates should be exposed to sale, under sheriff's or marshal's execution, *for gold and silver*, when these commodities were almost impossible to be obtained in the community, are melancholy facts belonging to the history of the past, which should, perhaps, be more grieved over than harshly condemned. It must be confessed, though, that occasionally a certain class of cold-blooded collecting attorneys were known to put in exercise all the harsher expedients known to the law in cases where a little more humanity and moderation towards the unfortunate defendants, whom circumstances had thrown into their power, would have comported better with the dignity of the legal profession, and have been equally advantageous to those in whose service they were enlisted. I shall not enlarge upon this prolific theme; though many scenes of pecuniary suffering at this distressful period, arising to some extent, from the causes just specified, are still held by me in painful and humiliating remembrance. I may be pardoned, though, for here



adding that attorneys who chance to be almost absolute strangers in the community where they are employed to enforce the collection of claims held by non-resident creditors, may, in general, be expected to display somewhat more of vigilance and activity, than the same lawyers would evince if seeking to secure the payment of debts owing by persons long known to them by multiplied acts of civility and kindness. Certain it is, either for the reasons suggested, or for some others not easy to be discovered, the greater part of the business of *collection* fell into the hands of attorneys who had not been long resident in the distressed and bankrupt community in whose midst they now had duties imposed upon them from which, with their attendant profits, I have before now known lawyers of a certain generous strain, and more desirous of securing forensic fame than of filling their pockets with money, instinctively to recoil.

In bringing these preliminary remarks to a close, the grave and interesting question seems naturally to suggest itself: Whether, upon the whole, it might not be better for society, were the existence of no class of persons tolerated, the members of which should be recognized as entitled by law to claim pecuniary recompense for services, the rendition of which, in some instances, would seem to array them in opposition to the sound administration of justice and law, and therefore against the best and highest interests of the community itself. There is certainly something very noble in the utterance of truth, and in the exercise of honesty without any expectation of requital, save the approval of conscience and the applause of the virtuous members of society. If it be one's duty to speak the truth always, it may be plausibly argued that it can never be creditable to assert falsehood. If perfect fairness and sincerity are required by every sound system of morals, it may be rather difficult to show under what circumstances it can be justifiable, for the gratification of mere mercenary motives, to act in conscious disregard of them both. To deprive the widow of her mite, and the orphan of his inheritance, because one is paid for these feats, it might puzzle either an Aristotle or a Plato to vindicate. To

labor for the acquittal of some notorious violator of that law, upon the firm and steady maintenance of which the peace and well-being of the community depend, seems, in a certain subtle point of view, to liken itself very closely to the becoming accessory to crime after it shall have been committed. To minds given to super-sublimated reflection, the idea might occur that at the dread moment when we shall stand before the great Searcher of Hearts, it might turn out to be an insufficient apology, when charged with upholding the guilty of this world, or cruelly harrassing the virtuous or unfortunate, that the culprit was one of an honorable and learned fraternity to whom these things had been regarded as allowable. Without going more deeply into these matters at present, I shall venture to say that, could it be satisfactorily demonstrated that all the offices now expected to be discharged by attorneys, were at all likely to be skilfully and beneficially attended to by some other body of functionaries from whom all prospect of pecuniary recompense should be withheld, it is quite probable that but little diversity of opinion upon this long-disputed topic would be anywhere apparent; and it, perhaps, may be safely admitted that the very highest evidence of advanced social culture and refinement which any civilized people could possibly supply, would be the present or future realization of that far-famed theory of gratuitous forensic exertion, boastfully asserted to have had existence in the purer days of the Roman republic, when (as is reported to us) the venerable sages of the law, the Catos, the Scævolas and the rest, daily came from their unostentatious residences and made their appearance in the Forum, as a token that they stood ready to bestow jurisprudential advice, *free of charge*, to such of their fellow citizens as chose to apply to them for aid. Whether this Christian world of ours is ever to know a time when lawyers shall become regardless of fees, and advocates be found willing to undertake the prosecution of the guilty or the defence of the innocent, merely for "the luxury of doing good," is a question which must be left to future generations to decide. But I trust that there are some even of the legal fraternity among ourselves who will agree with me in approv-

ing what an illustrious Roman advocate, (Quintilian) has said in his immortal work on rhetoric. His language is as follows :

“ Whether an orator ought always to plead gratuitously, is a question which admits of discussion, and which it would be mere inconsiderateness to decide at once, and without reflection ; for who is ignorant that it is by far the more honorable, and more worthy of the liberal acts and of the feelings which we expect to find in an orator, not to *set a price* on his efforts and thus lower the estimation of so great a blessing as eloquence, as many things seem worthless in the eyes of the world for no other reason than *that they may be purchased*. This, as the saying is, is clear enough even to the blind ; nor will any pleader who has but a competency for himself (and a little will suffice for a competency) *make a gain of his art* without incurring a charge of meanness. But if his circumstances demand something more for his necessary requirements than he actually possesses, he may, according to the opinions of all wise men, allow a recompense to be made him ; since contributions were even raised for the support of Socrates ; and Zeno, Cleanthes, and Chrysippus took fees from their scholars. Nor do I see any more honorable way of gaining a support than by the practice of a noble profession, and by receiving a remuneration from those whom we have served, and who, if they made no return would be unworthy of defence. Such a return, indeed, is not only just, but necessary, as the very labor and time devoted to other people’s business precludes all possibility of making profit by any other means. But in this respect, also, *moderation* is to be observed ; and it makes a great difference from whom an orator receives fees, and how many, and for how long a time. The rapacious practice of *making bargains*, and the detestable traffic of those who ask a *price proportionate to the risk* of their clients, will never be adopted even by such as are but moderately honest, especially when he who defends good men and good causes has no reason to fear that any one he defends will be ungrateful ; or, if such should be the case, I had rather that the client should be in fault than the pleader.

The orator, therefore, will entertain no desire of gaining more than shall be just sufficient, and, even if he be poor, he will not receive anything *as pay*, but will consider it only as an acknowledgment of service, being conscious that he has conferred much more than he receives. Benefits of such a nature, because they are not to be sold, are not to be thrown away; and it belongs to the obliged party to show gratitude."

One can scarcely avoid feeling some surprise that views so pure and exalted should have found utterance in hearing of the Roman youth during the reign of the infamous Domitian—at a period when the depravation of morals was so deep-seated and incurable—and when swarms of unprincipled informers had rendered life an almost intolerable burden, and freedom of speech an experiment almost the precursor of death. But even at that moment Tacitus and the younger Pliny were daily enunciating speeches to which Cicero or the elder Cato would have been delighted to listen, and the ethical teachings of Seneca were read and admired in all the fashionable resorts of relaxation and luxury. The principles of a high-toned and expansive system of equity were even then expounded, both in courts of judicature and in the public schools of that period, by able and eloquent advocates and professed lecturers, who aspired to maintain in unsullied purity the dignity of that forum where Crassus and Antonius, Cicero and Brutus had been once the most distinguished ornaments.

It would be but doing simple justice to the bench and bar of Mississippi, during the period which elapsed from 1830 to 1860, to assert that no state of the Union could then boast of an abler and more incorruptible judiciary, or a greater number of lawyers and advocates of deep legal learning, of brilliant and effective eloquence and of pure and unimpeachable morals. The election of judicial officers of every grade by the people, was productive of no such deleterious effects as many had predicted. Neither party influence nor mercenary considerations of any kind were known, in any very marked instance, to cause the popular vote to be concentrated upon an ignorant and corrupt aspirant over an opponent of superior probity and learning.

The ordinary devices of political electioneering were seldom resorted to, and never to the advantage of him who thus dishonored his own character. In the exercise of their noble calling, the members of the bar were almost uniformly upright, frank, and manly; vigilant and energetic, but courteous and accommodating; disdaining to succeed in any case by mere trick or chicane; and sacredly observant of all the engagements they assumed, or agreements into which they entered with opposing attorneys, whether these were oral or reduced to writing.

The shortness of the terms of judicial service provided by the constitution of the state was supposed to be attended with more or less disadvantage. The judicial incumbents of any given period having no satisfactory assurance of being re-elected when their respective periods of official service should expire, and this being necessarily dependent, to some extent, upon contingencies impossible to be anticipated, were naturally inclined to regard themselves more as members of that forensic brotherhood, from the bosom of which they had so recently emerged, and to which, in all probability, they would soon return, than as constituting a class of functionaries whose business it would be, so long as they might hold connection with the scenes of public life, to fit themselves more and more thoroughly for the high task of ascertaining the true state of the law, and of enunciating it in all its fullness and purity when thus ascertained—cultivating with ever-increasing assiduity a passionless *impartiality*—and steadily upholding principle in disregard of all the demands of personal, political, or local expediency. It has always seemed to me that the judges, in every country desirous of having an enlightened and reliable judiciary, should be allowed to hold their offices during good behavior, be liberally paid for their official services, and prohibited, after being once seated on the bench, from ever again enlisting in the practice of the law. Unless some such arrangement as this shall be adopted, it is plain that many inconveniences may result, some of which experience in several of our states has already brought quite conspicuously to view. Fortunately for the state of Missis-

issippi, no instance ever arose, during the space of time to which these observations are intended to apply, in which an individual occupying at the moment a place upon the bench, ever took upon himself the character of an advocate, or called upon some other attorney to preside in his place, whilst he should address him from the bar in favor of the interests of some cherished client, a decision in favor of whom he was solicitous of securing by the exercise of his own powers of forensic persuasion. I hold it to be absolutely certain that no judicial officer can often set this unfortunate example without losing more or less of his dignity as a selected expositor of the law. It is impossible that he can play Mansfield or Erskine, as his occasions may require. To be thoroughly confided in and venerated as a judge, he must altogether avoid the excited contests of the forum. It is much to be feared that a judge acting this part—if, under such trying circumstances, he is able to preserve unimpaired the true *judicial temper*—will not be so fortunate as to escape misconstruction as to his motives and character, which can not but be seriously prejudicial to his official usefulness.

I well remember that a little more than thirty years ago a highly respectable member of the General Court of Virginia, chancing to be on a visit to the state of Mississippi, took part in the trial of a cause of great interest in which an early and respected female friend was a party. He made an admirable argument for his client, and was much praised by all who listened to his speech in her behalf, for his eloquence and learning; but the fame of this exploit reached the heart of the ancient dominion, and produced the most vehement complaints of conduct deemed so un-judge-like, and the personage in question very narrowly escaped the experience of an *impeachment*.

But let us return to our immediate theme. It has now been a little more than two years since, just as I was departing upon a journey to the Pacific coast, I beheld upon the bed of disease the prostrate form of one of the most remarkable and interesting men I have ever known. I allude to the Hon. William L. Sharkey; who, for so long a period of years, had

been the acknowledged head of the bar of Mississippi, and who had presided as chief justice of her High Court of Errors and Appeals longer than any other individual has ever been known to do. I took an affectionate leave of my dying and honored friend, with no hope at all of ever beholding him again in this life. He died a few days after, profoundly regretted by all who have known him sufficiently to be able to appreciate his merits, and, as I confidently believe, without leaving a single enemy behind him. Judge Sharkey was a man of many shining and impressive traits of character. I held cordial and intimate intercourse with him for more than forty years, and have repeatedly seen him under circumstances well calculated to test the strength of his understanding, and of his exalted sense of self-respect. I never knew a person of more integrity and honor; nor one whose general course of life was more blameless and worthy of commendation. His mind was one of singular elasticity and vigor, and he had all its powers completely under his control. He was profoundly acquainted with law as a science, and exceedingly delighted in the examination of legal questions of particular importance and difficulty. He was a ready, ingenious, and impressive speaker; possessed of a majestic and commanding person; a clear, pleasant, and sonorous voice; graceful and appropriate gesticulation; and his countenance was ever lit up and made resplendent with the mingled rays of reason and sentiment. He was never affected, churlish, ostentatious or pedantic; always expressed himself in language simple, natural and idiomatic; was never unduly prolix in discussion, nor ever coarsely boisterous or dogmatical. His manner in speaking was in general marked with solemnity and earnestness, but he occasionally indulged in a humorous allusion, or in the relation of some pleasant and characteristic anecdote; but no man was ever less inclined than he was to be disrespectfully sneerful or unamiably sarcastic. He was indebted to a respectable institution in the state of Tennessee for whatever of education he had the good fortune to receive in youth and opening manhood; but he is understood never to have become familiar with the ancient classic languages, or to

have given more than ordinary attention to the more recondite departments of science. His stock of general reading was considerable; he was well versed in both ancient and modern history, and was one of the best informed politicians with whom I was ever acquainted. He had mingled freely in society, and possessed a knowledge of human nature seldom surpassed. In social intercourse he was easy and familiar; not in the least degree either assuming or austere, and ever carefully withheld himself from coarse and disreputable companionship. He was the acknowledged head of the Vicksburg bar so long as he continued in the practice of his profession, and enjoyed a lucrative practice up to the period of his advancement to the bench. Judge Sharkey held the office of Chief Justice of the High Court of Errors and Appeals in Mississippi far longer than any other person has been known to do, and during his period of judicial service delivered a series of opinions upon questions of commercial, criminal, and constitutional law, which have been for many years of great authority in every state of the Union. In the preparation of his opinions he employed much care, and when he enunciated them from the bench in his own animated and emphatic manner, no one was in hearing of his voice who was not interested and edified. The understanding and temper of this admirable man were both of an eminently conservative cast; he was much given to the reading of the scriptures and to the study of ethical works of a cheerful and inspiring character; was singularly patient and forbearing even towards those who had intentionally wronged him, and ever made a liberal allowance for the infirmities inseparable from human nature. He was averse to all sudden and extreme changes in the constitution and laws; had an almost morbid dread of popular outbreaks and excesses; and strongly disapproved of all movements, with whomsoever originating, and by whomsoever conducted, which looked ever so remotely to the dissolution of the Federal Union. The character of Washington he held in special veneration, and the counsels of his celebrated Farewell Address he recognized as constituting the true palladium of our national safety and felicity. In the



year 1850, as president of the celebrated Nashville convention, he evinced a mingled courage and wisdom which tended much to calm the excitement of that body, and commanded the respect of all true lovers of their country. A short time subsequent to the adjournment of this convention, Judge Sharkey paid a visit to Washington City, where he found Congress in session, and had an opportunity of making valuable suggestions which had no little effect at the time in suppressing sectional excitement and in allaying rising discontents. Whilst in Washington, President Fillmore, through Mr. Webster, in a singularly complimentary manner, tendered him the position of secretary of war; but he declined the proffered honor promptly and respectfully; alleging, with characteristic modesty, his own want of qualification for this high place, by reason of his not having before had that kind of experience which he deemed requisite to the successful administration of this important office. The fact is known to me personally that he even left Washington City somewhat precipitately, in order to avoid further solicitation on this subject. His known devotion to the Union and aversion to uncalled-for civil strife exposed him to no little discomfort and harassment during the late most deplorable sectional conflict; but those lofty attributes of character which all knew him to possess, and his patient and dignified conduct throughout that trying period, caused him to be loved and respected by all virtuous and well-intending citizens far more than he had ever been before; and when the clash of arms at last ceased to be heard in the land, and the people of Mississippi were seeking to be reconciled to the government against which they had been arrayed, and to be re-admitted into that sisterhood of states from which they had for a time severed their connection, it was under the counsel and leadership of this venerable and trusted personage that these desirable objects were ultimately attained. As provisional governor of Mississippi and as a senator-elect to Congress, Judge Sharkey attracted in a particular manner the general attention of his countrymen, and could his voice have been then heard in that "more than Amphycyonic council" of sovereign states,

and his sage counsels been listened to, the sublime work of national pacification, since so happily realized, would, in all probability have been much earlier effected.

Whilst Judge Sharkey was yet at the bar, I had once or twice the honor of being associated with him in the trial of capital cases of no little importance, on which occasions, as senior counsel, he manifested, in a manner which I can never forget, all that tact and discriminating judgment which distinguished him, and in discussion evinced powers of which no advocate that I have known need have been ashamed.

Many persons yet surviving in Mississippi remember Judge Sharkey's earnest and energetic opposition to the election of judges by popular suffrage, when it was first proposed to incorporate a provision for this purpose in the new constitution of the state, then about being adopted; yet it is a circumstance worthy of note, and one demonstrating conclusively his standing and popularity at that time, that he afterwards became the first Chief Justice of the state under the new system of judicial election. In subsequent years several grave constitutional questions arose for the decision of that tribunal in which he was then presiding. On one of these occasions the alleged invalidity of what were known as the Union Bank bonds was expected to come up for consideration; and, though it was well known everywhere that he regarded these bonds as obligatory upon the state, and though a majority of the voters in his judicial district were undeniably opposed to being taxed for the payment of the same, yet was he triumphantly re-elected over the opposing candidate, though the latter was a jurist of undoubted learning and ability, and had formally pledged himself, if elected, to decide the bonds to be invalid. In this contest Judge Sharkey delivered a number of popular addresses in which he boldly defended his own views upon this subject, and remonstrated with his fellow citizens in the most eloquent and convincing manner against the repudiation of the pledged faith of the state at that time proposed. The result of the contest was alike creditable to those by whom Judge Sharkey was re-elected and to himself.

Judge Sharkey had been occupying a place upon the bench

some three or four years, when he was fated to pass through one of the severest ordeals which any public man has had to encounter. The celebrated book of Stewart, in which Murrell and his associates were charged with having set on foot a scheme of negro insurrection, which it was asserted looked to the general destruction of the white population of the South, had reached the state of Mississippi and had awakened the most wide-spread excitement and alarm. The more densely settled counties of middle Mississippi, it was apprehended, would be soon laid waste and ruined. The people were apprehending that all the unnamable horrors of servile revolt would soon blaze forth among them in the most aggravated form. Stewart himself had been received at the capital of the state and elsewhere in the most enthusiastic manner, and public honors had been accorded him such as the most illustrious benefactors of the human race have seldom enjoyed. A fine horse was purchased and presented to him, and he became the recipient of many costly presents besides. In a short time the whole country became thoroughly convulsed. Large public meetings occurred, and the most elaborate preparations were made to meet the multitudinous foe. In a number of counties, vigilance committees, or committees of safety (as they were sometimes called) were organized, and efficient instrumentalities of every kind provided, by means of which suspected persons were to be apprehended and brought to trial. Such a trial was quite sure to result in speedy conviction and execution, without the benefit of jury trial, or the privilege of habeas corpus. The popular mind was in such a diseased and phrenzied condition that nothing was wanting but the kindly offices of the *guillotine*, to usher in all the imagined glories of Jacobinical violence, such as stand imperishably connected with the names of Danton, Robespierre and Marat. Just at the moment when the public furor was at its acme, and when instances were occurring of the owners of large numbers of slaves being arraigned before these lawless and self-constituted tribunals; persons who, though themselves wholly untinctured with the abolition *virus*, but who, having thus far been able so far to preserve their mental equipoise as

to disapprove most strongly the confused and bloody proceedings then in progress, were on that account suspected of complicity in the dark scheme of criminality which was supposed to have been concerted. By a singular coincidence, the celebrated hanging scene occurred at Vicksburg, whilst the whole interior country was in the condition just described, intelligence of which event was brought to the city of Jackson on the very day that Judge Sharkey called at my room in one of the hotels of that city and asked an interview with me, laying before me a letter which he had just received from a valued relative of his, Mr. Patrick L. Sharkey, which he asked me to read. The letter informed the judge that the writer thereof was then in the neighboring town of Clinton, was about to undergo trial before the safety committee there in session, and besought him to come as soon as possible to intercede for his life. Patrick L. Sharkey was one of the wealthiest planters in the county of Hinds, and a justice of the peace. A body of men from the adjoining county of Madison, having arrested one of his most respected neighbors a day or two previous, with the intention of carrying him to the town of Livingston for trial, where men were then being summarily hanged almost daily, Sharkey had ventured to protest against their action, and, claiming jurisdiction of the case, had turned the alleged culprit loose. This conduct had brought down upon him the vengeance of the *Regulating Band*, by whom his house was attacked in the night-time, and in defence of which he had slain one of the trespassers, and been severely wounded himself; but escaping in the dark, he had voluntarily appealed to the committee of Hinds county for a full investigation of the affair, being quite willing to be tried by citizens of his own county, but wholly averse to being dragged to Livingston, where, he felt assured, his life would not be for a moment safe. After I had read the letter referred to, Judge Sharkey proposed to me to go with him to Clinton, which being the place of my own residence at the time, he thought I might be able to exercise some influence in favor of his imperiled kinsman. We proceeded to Clinton accordingly; where we found the examination about com-

mening. The unhappy man at whose summons the judge had come to the place of trial, was suffering greatly from the wounds he had received, and was scarcely able to sit erect whilst his conduct was undergoing scrutiny. The proceedings of the committee being ordinarily conducted with closed doors, Judge Sharkey, without asking the privilege of being present whilst the trial was going on, contented himself with addressing the committee a few words before the adduction of testimony should occur, which were listened to with the most profound attention and respect. This short and touching address to the committee was truly a master-piece of its kind. Neither Erskine nor Curran could have met the dangers of the moment with a greater display of discretion, of *tact*, and of soft, insinuating persuasiveness, than Judge Sharkey on this occasion put in exercise. He knew too well the disturbed condition of the country to call in question the authority of the committee. He did not even allude to his own power to grant a habeas corpus for the relief of the accused. He frankly confessed the utter powerlessness of the courts in such an exigency as had then arisen. He appealed directly to the self-respect and known intelligence of the committee, at whose hands he could not doubt that justice would be rendered in the case. He showed the gross absurdity of the charge of *complicity* which had been preferred; and concluded by urging with great solemnity and impressiveness the duty of the committee to protect the citizens of their own county from trial beyond its confines, and by persons already too much prejudiced against the individual then in custody to give him a fair and dispassionate hearing.

I need hardly say that the committee were not long in determining this interesting case in favor of the accused. That their action was wise and equitable, may be inferred from the fact that Patrick L. Sharkey afterwards brought an action of damages against those who had so ruthlessly invaded his home, and recovered damages from them to the amount of \$10,000, not a farthing of which found its way into his own pocket, but was generously distributed in charity.

There is another instance in Judge Sharkey's history as a

public man which I feel inclined to mention, as illustrative of the principles which uniformly guided his career as a sound and conservative statesman. In the year 1858 a commercial convention was held in the city of Vicksburg. I had the honor of being a member of this body as a delegate from the state of Tennessee. Much to the surprise of many who attended on this occasion, a proposition was introduced by a delegate from the state of South Carolina for the re-opening of the African slave trade. The question had been discussed a few months before, in the legislature of South Carolina, and had there failed of being adopted by reason of the wise and manly opposition of General Wade Hampton, whose forcible and eloquent speech on the subject I read at the time with the highest gratification. It was argued by the supporters of this policy that there was nothing in the Constitution of the United States which, properly considered, was positively prohibitory of this infernal traffic, and that the revival of it would be productive of great advantage to the Southern states in general, and tend to build up the city of Charleston as a great commercial emporium. A more ingenious and powerful speech than that delivered in support of the measure proposed, by its chief champion, I have rarely heard. It was listened to with breathless attention and applauded vociferously. Those of us who rose in opposition were looked upon by the excited assemblage present as *traitors* to the best interests of the South, and only worthy of expulsion from the body. The excitement at last grew so high that personal violence was menaced, and some dozen of the more conservative members of the convention withdrew from the hall in which it was holding its sittings. Judge Sharkey hearing of this tumultuous scene, came at once from his own residence in Jackson, to Vicksburg, and did what he could to still the raging tempest. The fact having been ascertained that this movement in behalf of the re-opening of the slave trade was the result of *pre-concert*, and that the agitation which had been initiated was designed to operate upon a State Democratic convention, the session of which was to occur in Jackson in a few days, Judge

Sharkey proposed to me that I should accompany him to several neighboring counties, in advance of the convention, and aid him in putting the people of Mississippi on their guard against the coming danger. This I cheerfully agreed to do; being perfectly satisfied that out of the question which had now been so suddenly sprung upon the South, the utmost mischief might ensue, if no opposition should be reasonably and effectively interposed. Many are yet living who, I am certain, will agree with me that the speeches which Judge Sharkey delivered at this time were among the most felicitous of his life. They unquestionably had much effect in suppressing the dangerous agitation which had commenced.

HENRY S. FOOTE.

NASHVILLE, TENN.

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[Want of space obliges us to hold over the remainder of this most interesting paper until the January number.—Ed. So. L. R.]

## Foreign Selections.

### *I. PACTA ILLICITA.*

The plea that a contract is contrary to public policy, or immoral, and that, therefore, it is not binding, is so convenient a way of getting rid of troublesome obligations, that it cannot surprise us to find that it has been often raised, and under the greatest variety of circumstances. The law of England, as well as our own, abounds with curious decisions, giving rise to very curious distinctions, upon this subject of illegal or immoral contracts. Perhaps these distinctions are as delicate as any which the ingenuity of bench and bar have ever invented. In addition to the interest arising from the consideration of such nice points of law, these decisions throw a curious light upon the social history of the past. Some relate to the early struggles of labor against capital—put down with a high hand by Tory judges; others remind us of the days when smuggling was so rife upon our coasts. They tell of an age when gambling was universal; when lotteries were really popular; and when the state, by means of usury laws, imposed restrictions upon a more legitimate means of making money.

It is also curious to observe the varied class who have from time to time availed themselves of such a plea—a class composed of ruined gamblers, heartless profligates, penitent Sabbath-breakers, idle apprentices, wily lawyers, and others. We propose in the present article briefly to illustrate, by means of the decisions, some of the principles and distinctions which have been established in this branch of the law.

Taking first that class of illicit and invalid contracts which may be said to have sprung out of the domestic relations, we find our law, from a regard for the sacredness of marriage and a desire to throw every obstacle in the way of those who despise or dispense with its legal ties, refusing to give effect to any obligation arising out of the unlawful intercourse of the sexes. To such an extent was this policy pursued, that it was after some hesitation that the right of a woman to recover damages for seduction came to be recog-



nized. There is a number of reported decisions relating to bonds *causa adulterii*, but it is satisfactory to observe that there are almost none of a recent date. In the old case of *Durham*,\* where a bond was granted to secure a certain sum to the adulterous issue, the lords found that it could not be registered, nor found an action, either at the instance of the mother or of the child. In the next century, however, we find an equitable distinction being made between a bond in favor of an adulteress and one granted to her innocent child, and the court allowing an action to lie upon the latter.†

In the case of *A. v. B.*‡ a distinction was made between an action to enforce such an obligation, and one to reduce it at the instance of the grantor's heir. We are told that the judges "expressly recognised the distinction between the situation of an obligation *ob turpem causam*, where an action is brought to compel implement of it, and its situation where action is brought to be restored against implement which has already taken place." From the case of *Johnstone v. M'Kenzie's Executors*,§ it would rather appear that an annuity *ob turpem causam*, even when given by way of legacy, will not be effectual. In that case the executors of the deceased refused to give effect to the bequest, and an issue was allowed to try the question whether or not it was the reward of immorality.

In the English courts, bonds granted in favor of mistresses have been the subject of several decisions. Generally speaking, no such bond will be valid if it has been granted with a view to induce future cohabitation; and accordingly, in one case, we find the question left to the jury was whether at the time the bond was given there was or was not an intention and agreement to continue the connection for the future.|| "The law," says Vice-Chancellor Wigram, in the case of *Hall v. Palmer*,¶ "has been correctly stated to be, that if a bond be given for future cohabitation, either wholly or in part, it is void. Another way of stating the question is, that if the instrument is of such a nature as to give to either party a motive to continue the connection, it is void on the ground of its being *turpis contractus*." In the old case of *Turner v. Vaughan*,\*\* where the bond was for past cohabitation, Justice Bath-

\* July 20, 1622.

† May 21, 1816, F. C.

‡ *Friend v. Harrison*, 2 C. & P. 584.

† Hamilton, June 26, 1765, M. 9471.

§ May 14, 1806.

¶ 13 L. J.

\*\* 2 Wilson, 339.

urst observes, "where a man is bound in honor and conscience, God forbid that a court of law should say the contrary. And wherever it appears that a man is the seducer the bond is good." In one case, however, where the woman knew that the man with whom she had been cohabiting was married, a bond given to her at the termination of the illicit intercourse, securing an annuity for herself and also providing for the issue, was held void. On the other hand, the law will, in the ordinary case, favor such provisions, and the mere fact that the granter expressed his intention of continuing the connection after the date of the bond, and even the carrying out of that intention, will not render it *turpis contractus*.\*

Another class of cases which illustrates the care taken to secure marriage obligations is to be found in the decisions relating to contracts *contra fidem tabularum nuptialium*. In a number of cases we find sons relieved upon this ground from obligations entered into upon the eve of marriage with their own or their wives' fathers, and to the prejudice of their marriage provisions. It seems to have been the custom at one time for fathers, while ostensibly making favorable settlements for the children upon their marriages, to extort back bonds relieving them to a greater or less extent from what they had undertaken of such transactions. The cases of *Grieve v. Thomson*,† where a son had given to his father a virtual discharge of his obligation under the marriage contract, and that of *Arbuthnot v. Morison*,‡ where a father-in-law had had recourse to the same device, are examples.

Under the head of *Sponsiones Ludicæ* in *Morison* is placed—"Premium for procuring a wife." In an early case§ we find the Earl of Buchan suspending a charge upon a bond granted by him to Sir John Cochrane of Ochiltree, for his assistance in procuring to the Earl an English lady in marriage with a certain fortune. Fountainhall reports a similar case, which, he says, "moved laughter."

The form of such a bond or written obligation is given in the later case of *Thomson v. MacKaile*.§ In that case it was granted by a father and a son in favor of an Edinburgh lawyer, whose wife appears to have been the match-maker, and contained an agreement to pay a small sum of money "three days after the date of

† Hall's case, *supra*.

‡ November 22, 1716, M. 9487.

† February 21, 1785, M. 9478.

§ January 27, 1698.

|| February 14, 1770, M. 9519.

the contract of marriage that shall, by the providence of God, be voluntarily entered into, and signed and delivered, betwixt our son and a young gentlewoman described as within." There were elaborate arguments in this case, and it was maintained, in support of the validity of the bond, that there were, perhaps, very few marriages which were not brought about by the intervention of third parties. The court, however, found the missive *contra bonos mores*, and assoilzied the defender.

In the case of *Proven v. Calder*,\* a bill granted to a young woman in security of a promise of marriage was sustained. But really here there was nothing more than an action of damages for breach of promise, with this peculiarity, that the amount of damages had already been assessed by the parties.

Wagers and other gambling transactions have not met with much favor from our law. "The view" says Mr. Bell, in his Commentaries, "which has been taken in Scotland is, that the laws of the country and its judicatures were instituted to determine adverse rights, and not the idle or impertinent doubts and inquiries of persons not interested in the matter." The common law which viewed such contracts as trifling, if not actually immoral, was supported by statutes so early as 1621, when the act "anent playing at cardes and dyce and horse races," was passed. In the old case of *A. v. B.*† the lords sustained a pursuit which "was intended for a sum of money which the defender was obliged by his promise to pay in case he should be married; having gotten from the pursuer in the meantime a piece which the pursuer was to lose in the case the defender should not be married." But "some of their number were of the opinion that *sponsiones ludicæ* of the nature fore-said ought not to be allowed."

Bankton, however, says,‡ "A wager is a mutual stipulation between two persons, whereby the one agrees to forfeit or pay a sum of money, etc., to the other, on condition a thing be or be not as asserted, or in the event of an uncertain contingency. There seems, in the general, nothing unlawful in this more than in a conditional obligation." That wagers have sometimes been sustained as the grounds of legal proceedings is clear from the case of *Hope v. Tweedie*,§ in which an action for a wager of a pipe of wine between two gentlemen, to be paid to him who should walk first to Edinburgh from a certain place in the country, was held compe-

\* January 23, 1742, M. 9511.

† i. 421, 46.

‡ February 9, 1676, M. 9505.

§ December 3, 1776, M. 9521.

tent; and in the later case of *Bruce v. Ross*,\* the opinion that a wager was in no case a legal ground of action does not seem to have been an unanimous one.

The act 1621, c. 14, aimed at discouraging gambling, by forbidding cards and dice altogether in houses of public entertainment, and even in private dwellings, except when the host took a part in the game; while it forfeited to the poor of the parish all gains above one hundred merks made within twenty-four hours, either by cards, dice, or horse-races. The party who lost was still bound to pay, and accordingly in one case the Lord Advocate was found entitled to insist on consignment of the money. Sir George Mackenzie, in his observations upon this statute, remarks that this act "is not extended to other wagers, such as that ships will arrive at such a day, or in such a place, which was not found to fall under this act, which speaks only of cards, dice and horse-races. It seems that this act would not be extended to any other game." It is not surprising that in that age such a statute was not strictly observed. Little more than forty years after it was passed, we find it argued that "the act of Parliament is in desuetude, and it is now frequent by persons of all quality to play and to pay a greater sum than 100 merks." The lord, however, "found the act of Parliament to stand in vigor."† In 1774, it is reported that "the point deliberated upon by the court was whether or not the act of 1621 was in desuetude?" They again decided in favor of the vitality of the act, and ordained intimations to be made by certain kirk-sessions interested in the matter.‡ Its most modern supporter is Lord Deas, who remarked in a recent case, "that this statute remains in force I have no doubt whatever." The act of 9 Anne, c. 14, was passed "for the better preventing of excessive and deceitful gaming." It applied to all kind of games, and rendered every species of document granted for gaming debts null and void. Parties who lost were entitled, under certain conditions, to sue for the recovery of the money which they had paid, and if they failed to take benefit of this provision, any other person might, recovering treble value—two-thirds of which was to go to the poor. Since the date of this act several statutes have been passed, the tendency of all of which has been still further to discourage gambling transactions, and to strengthen the distinction between innocent and immoral games and sports.

\* January 26, 1787, M. 9523.

† *Park v. Sommerville*, Nov. 12, 1668, M. 3459.

‡ *Maxwell v. Blair*, M. 9522.

Perhaps the plea of *pactum illicitum* was never sought to be extended further than by some of the judges in the case of *Paterson v. Shaw*.\* That was an action of damages raised by one Edinburgh gentleman against another who had represented that he cheated at cards. The jury court, when the cause was remitted to them, raised a doubt as to the relevancy of the action, seeing that the slander libelled arose out of an illicit transaction between the parties, and the case was accordingly sent back to the Court of Session for the purpose of having the question of law decided. In his note upon this case the Lord Chief Commissioner observes, "The saying or writing of another that he cheats at play is an actionable slander; but if it appear upon the face of the summons and issues, or either of them, that the slander relates to an illegal, prohibited and punishable transaction, a series of questions occurs on the relevancy—on the broad question whether *ex tale transactione actio oritur*? If he had not been engaged in an illegal act the slander would not have taken place, and by the terms of the summons, the illegal conduct is the foundation of the complaint." In the Court of Session several of the judges expressed their doubts as to the competency of the action, and they seem to have got over the difficulty which they felt in admitting the evidence of illegal transactions by treating the alleged slander as a criminal accusation. "At first," said Lord President Hope, "I entertained some doubts, but when I see the very fact charged of cheating at cards is made a crime by the statute I cannot have any. The relevancy of the action was accordingly sustained, and issues sent to a jury. But although the court will thus admit as relevant evidence what is practically an inquiry into the rules of a game of chance, when the object is to determine the truth or falsehood of an accusation, and consequently the right to damages, they have firmly resisted any attempt to obtain their decision when the question has really been whether or not a party has played unfairly. Sums lost in play can not be recovered, nor the gainer's claims enforced. The case of *Paterson v. Macqueen and Kilgour*,† is upon this point very interesting. It was an action raised by the executrix of a Mr. Paterson against two defenders, who, as she alleged, had taken advantage of the deceased, who was not in full possession or command of his mental capacities, and had won from him by unfair play considerable sums of money, for which he had granted bills

\* 20th Feb. 1830, 8 Shaw, 573.

† March 17, 1866, 1 Macph. 606.

and promissory notes. There was, however, no allegation of absolute incapacity on the part of Paterson. The pursuer argued that this was not an action of repetition, but of damages. In deciding the case, the Lord President (Colopsey) remarked: "It is not denied that, if the play was fair, these sums were actually lost. Now what does that resolve into? If the play was fair, although artifices were used to induce Mr. Paterson to engage in it, he could, I apprehend, not have come here to recover the sums so lost, just as the other party could not have come here to enforce his claim; for we do not take cognizance of gambling debts in any circumstances. But then it is said that this is a case of cheating at cards, by which it is meant that the play was unfair. But if this court does not take cognizance of fair play, is it to go into the rules of the game, and inquire whether there has been unfair play? That is as much out of our cognizance as the other." Lord Deas said: "I think if we were to sustain an action of damages in such circumstances we should just be sanctioning in another form a *condictio indebiti*." The action was accordingly dismissed as incompetent. The decision does not, of course, exclude the competency of an action to recover money obtained by gambling from some one really in a state of mental incapacity. Here there would be no question of fair or unfair play, but a charge of obtaining money from one who was incapable of managing his own affairs, and did not know what he was about. Lord Deas carefully guards himself in deciding Paterson's case. He says: "It is not necessary to hold that there never can be a relevant action for cheating a man out of his money while he is engaged in playing cards. But if there can be such an action, it would require to be founded on very specific allegations of something altogether different from a violation of the rules of the game—allegations exclusive of all enquiry as to whether the rules of the game had been violated or not. If the action had been founded upon distinct allegations of total incapacity on the part of Mr. Paterson, either from drink or mental defect or disease at the time when he lost and paid the money, I by no means say that a case of that kind would have been irrelevant." It is, however, clear from this decision that in order to make an action of this kind relevant, there must be very distinct averments of incapacity.

Reference has already been made to the light in which, apart altogether from statute, wagers are viewed by the law of Scotland. They are deemed too trifling to engage the attention of a court—or, in legal language, a wager is *sponsio ludicra*. As was remarked

in the old case of *Wordsworth v. Pettigrew*,\* “Courts of Justice were instituted to enforce the rights of parties arising from serious transactions and can pay no regard *sponsionibus ludicris*.” But a gambling transaction has nevertheless formed (indirectly at least) the ground of a competent action. A good illustration of such an action is afforded by the case of *Graham v. Pollok*.† A certain dog having won in a coursing match, a dispute arose between its nominator and its owner, both claiming the stakes. The stakeholder raised an action of multiplepoinding, to which both were called. The competency of the action, arising as it did out of this sporting transaction, was questioned. The majority of the judges decided in favor of the competency, and repelled the plea of *sponsio ludicra*. But the ground upon which they did so is clear from the judgments. It by no means follows, said Lord Fullerton, “that after the prize is won, and the *sponsio ludicra* determined, competition regarding the prize may not arise involving questions of law properly within the province of the court.” In this case the question was not which dog had won the match, or whether the match had been fairly proceeded with—with such questions the court could have nothing to do. But, as pointed out by Lord Jeffrey, the whole sporting question had been settled and the prize awarded, and the question to be decided was simply what individual had an interest by law and contract in what dog had won. There was in fact a question of patrimonial interest which it lay within the province of the court to dispose of. This case, taken with the more recent decision of *Calder v. Stevens*,‡ would seem to establish, that while the court would not decide who had won a race or game, on the principle of *sponsio ludicra* and would not sustain any gambling transaction because illegal, questions relating to the right to stakes (always assuming that the game or contest was a legal one) may form the ground of competent actions. In *Calder’s* case, the action was raised to enforce payment of the stakes at a racing meeting. The Lord Justice Clerk, in giving judgment, after pointing out that a horse-race is not unlawful, and noticing the distinction of the civil law between games of chance and the *certamina de virtute*, remarks, “While, therefore, our courts would probably refuse to decide who was victor in such a game, or who gained an archery or rifle prize, still, if the contest was lawful in itself, and no such question unsuited to a court of law arose, there is no prin-

\* May 15, 1799, M. 9524.

† Feb. 5, 1848, 10 D. 646.

July 20, 1871, 9 Macph. 1074

ciple on which they should refuse to decide a purely patrimonial question arising out of it. If the holder of the Elcho Challenge Shield refused to deliver it to the acknowledged winner, I do not suppose we should hesitate to do justice in such a case; and the case of Graham about the prize at the coursing match is an illustration of the distinction. For in all these cases, and many more which might be suggested, the contest or sport itself was lawful, although gambling on its issue was illegal."

It is instructive to compare these cases, in which action was sustained with that of *O'Connell v. Russell*,\* in which it was refused as incompetent. In that case the action was, as in the others, for the recovery of stakes. But it was upon the ground of unfair conduct upon the part of the winning jockey. The pursuer, indeed, contended that his action was grounded on the contract of deposit with the defender as stakeholder, who was no party to the wager. From the circumstances, however, of the case, it was impossible for the court to decide it without assuming the position of umpires and determining upon the evidence who won the race.

By the 18th section of the act 8 & 9 Vict. c. 109, which declares that all gaming contracts are null, and that no sum staked upon a wager can be recovered in a court of law, an exception is made in favor of subscriptions towards "any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise." But the Scotch cases have not proceeded upon this statute; on the contrary, there have been repeated doubts expressed from the bench as to whether it extends to Scotland.

In England there has not been the same reluctance to deal with wagers in courts of justice, or at all events they have not in that country adopted the general principle that the settlement of such disputes is unworthy of these tribunals. Of course the common law has been altered by the statutes just referred to. But in order to diminish the number of cases of this sort prior to the act 8 & 9 Vict., certain classes of wagers had been entirely discountenanced as being *contra bonos mores*. Thus, in the famous case of *Da Costa v. Jones*,† action was refused upon a bet laid between two persons upon the sex of a third, on the ground that such a wager led to an indecent inquiry. Lord Mansfield, in giving judgment in that case, remarked, "Whether it would not have been better policy to have treated all wagers originally as gaming contracts, and so have held them void, is now too late to discuss. They have too

\* Nov. 25, 1864, 3 Macph. 89.

† 2 Cowper, 729.



long and too often been held good and valid contracts. But notwithstanding they have been so generally entertained, there must be a variety of instances where the voluntary act of two indifferent parties, by laying a wager, shall not be permitted to form a ground for an action or a judicial proceeding in a court of justice."

There are accordingly a curious and not very consistent set of decisions relating to wagers in the law of England. Lord Campbell has observed, "I regret to say that we are bound to consider the common law of England to be that an action may be maintained upon a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy. I look with concern and almost with shame on the subterfuges and contrivances and evasions to which judges in England long resorted, in struggling against this rule, and I rejoice that it is at last constitutionally abrogated by the legislature."\* Not only were immoral and indecent wagers invalid, but also those which the judges chose to consider as opposed to public policy. Hence wagers between voters as to the result of the election were found to be illegal, as contrary to the foundations of the constitution, and tending to encourage bribery and corruption.† So also was a wager upon the probability of the assassination of the Great Napoleon, being considered at once immoral and contrary to good policy.‡ Upon the same principle wagers respecting the amount of any branch of the public revenues, or of the result of a criminal trial, have been treated as illegal.

In the case of *Foulds v. Thomson*,§ an attempt was made to escape from liabilities incurred to a stock-broker upon the ground that the transactions in which he and his principal had been engaged constituted gaming and wagering in the sense of 8 & 9 Vict. This case raised the question whether the common speculations on rises and falls in the market are gambling transactions. To all appearance there is in such cases a purchase and transfer of stock, while in reality the parties are taking the chance of the rise or fall in the market, and contracting only for the differences. It was held in the Sheriff Court that such transactions were wagers—but that as they were only null and void, not illegal, the broker who

\* *Thackoorseydass v. Dhondnull*, 6 M. P. C. C. 300.

† *Allen v. Hearn*, 1 T. R. 36.

‡ *Gilbert v. Sykes*, 16 East, 150.

§ *Foulds v. Thomson*, 19 D. 803.

had given his professional assistance, was entitled to remuneration. But the Court of Session, without deciding what the claim of the broker would be if dealings in which he had been engaged had been null and void, held that they were not, not being wagers or belonging to the class of transactions struck at by the act in question. "The question," said Lord Murray, "before us is—Is there anything like gaming or wagering in the transactions complained of? In all gaming, one party wins and the other loses, all can not gain; but here so much stock is bought—it rises. A. has sold, B. has bought through a broker. A. may have sold at a higher price than he paid. B. may in turn do likewise, in which case all might be gainers. This cannot be gaming. I am far from saying they are engaged in a laudable pursuit. But all the parties might equally lose. I can not assimilate this to the nature of gaming or wagering, to constitute which there must be two parties, one of whom must lose."

As in many cases of gambling debts—bills and bonds have been granted which have afterwards in the hands of indorsees given rise to litigation; the question as to how far a *bona fide* indorsee is to be prejudiced by the invalid consideration for which his bill was given has more than once been raised. In the case of *Stewart v. Hislop*,\* it was found not competent to prove by witnesses that the bill charged on was accepted for money lost at game, against an endorsee for an onerous cause, who was not privy to the wrong. The same doctrine was given effect to in the case of *Neilson v. Bruce*.† Yet the words of the act of Anne are very distinct, providing that notes, bills, etc., for gaming debts "shall be utterly void, frustrate and of none effect, to all intents and purposes whatsoever." A different view of this statute had moreover been taken in England, as is shown by an opinion of Lord Mansfield,‡ where he says, "The law is settled that a holder coming fairly by a bill or note has nothing to do with the transaction between the original parties, unless perhaps in the single case (which is a hard one, but has been determined) of a bond for money won at play." It was probably the reasonable desire to secure a uniform practice in the administration of the statute in both countries, which led the Court of Session in the unreported case of *White's Trustees v. Johnston's Trustees*,§ to find that the objection of having been granted for a game debt applied to bonds in the hands of an onerous as-

\* February 18, 1741 M. 9510.

† 2 Douglas, 636.

‡ January 25, 1740, M. 9507.

§ January 22, 1819.

signee. In the subsequent case of Elliot,\* they passed a bill of suspension of a charge given by the indorsee of a bill granted for a gaming debt; and in the case of Hamilton v. Russell,† Lord Cringletie observed: "I think such a bill is just a piece of waste paper." The case of White's trustees, already referred to, came before the court again‡ in a question between the assignee (who had failed to recover anything from the debtor under the bonds) and the assigner, from whom he sought repayment of the money which he had given for them. The latter, taking advantage of the new construction put upon the act of Anne by the Scotch Court, pleaded that his assignation being null, he was freed from any liability to repay. But the court upon the assumption that the assignee was in *bona fide*, rejected this view without any hesitation. "When a party," said Lord Glenlee, "knowing a document of debt not to be due and exigible from the granter, gets money from an innocent party by assigning it, he must necessarily be bound to repay." The Lord Justice-Clerk said, "I am clear upon the principle that, if it could be held that a person getting the bond, perhaps upon the very night when the gambling takes place, might go to a third party, innocent of the gambling transaction, and get money for the documents of debt, and when repetition is asked might get out of it in this way, it would be an absolute solecism." By 5 & 6 William IV. c. 41, bills, notes, and mortgages in the hands of purchasers for value are not void, but only held as for an illegal consideration, and if on such instruments the granter or maker has paid the money to the holder, he may recover it as money paid to the original payee, as on an illegal consideration.—*Journal of Jurisprudence, (Edinburgh).*

\* Nov. 24, 1826, 5 Shaw, 40.

† May 18, 1832, 10 Shaw, 549.

‡ May 28, 1828, 6 Shaw, 818.

## II. AFTER-TRIAL ADVOCACY.

The increasing practice of indiscriminate after-trial advocacy is pernicious in the extreme. Whether it be Dr. Kenealy dilating on the Castro-Orton prosecution, Serjeant Ballantine on the Guikwar of Baroda trial, Mr. O'Connor on the Tweed *fasco*, or Mr. Thomas Shearman on the Tilton-Beecher case, this excess of professional zeal must be condemned. Indeed, its mischievous tendency could hardly be more deterrently depicted than by the recent exhibition at the London City Temple, where Mr. Shearman (one of the Rev. H. W. Beecher's counsel at the late trial, attended in order "to answer any questions on the subject of the trial;" but, no questions being asked, volunteered a statement, in the course of which he said that "the counsel for Mr. Beecher were, not merely professionally, but personally satisfied of his entire innocence, while at least two of Mr. Tilton's counsel were privately of the same opinion, one of them having, just before receiving a retainer, denounced the prosecution as 'the most infernal conspiracy of modern times.'") We cannot help wishing that an example *in terrorem* were made of some of those who unbosom themselves of such utterances. The case may be remembered of the "vakeel," practicing in Kattywar, who signed an address from the Rajkote Association to Serjeant Ballantine, after the Baroda trial, referring to difficulties thrown by government in the way of his appointment to defend the Guikwar, complaining of the "indifference which the government had manifested in deposing their ancient ally," and declaring that in the end virtue would prove triumphant—an address which was followed by a ukase, in the following terms: "Nagindas Byrbhukhandas, a vakeel, and authorized translator in the courts of the Kattywar Political Agency, having published a document in which the British government is charged with dishonorable acts and intentions, his sunuds are canceled from this date." This sentence was, at all events, sufficiently severe. But such acts as that of Mr. Nagindas, in the words of Jeremy Taylor, "tear the knot that ties the mantle of justice," and have before now met with yet more condign retribution. Le Breton, an advocate of Poitiers, who had lost the cause of a

widow and child which he had taken up, was persuaded that justice, though not the law, was with him. He made strenuous but unavailing efforts to have the law reformed, and presented himself before Henry III. who treated him with contempt. He then printed a book containing the case, interspersed with "a thousand calumnies against the king and parliament," for which he was brought to trial. The book was burned before his face. The writer was hanged. This was an unpleasant consequence, which, however, in later times M. Odilon Barrot was more fortunate in escaping. Wilfrid Regnaud, whose case first established his reputation at the French bar, was a village philosopher, who talked socialism, but was a good neighbor and a peaceable citizen, and had been, on the most worthless evidence, convicted of the murder of an old woman, and sentenced to death. On looking over the record, Barrot found that one count in the indictment against Regnaud was that he had been among the *Septembriseurs*—a charge which, even if true (and it was not true), could have nothing to do with the question before the jury. Those, however, were the days of the White Terror, and to be a republican was to have small chance of a fair trial. Three-fourths of the jurors were Knights of St. Louis, or old *émigrés*. Nevertheless, the procedure had been perfectly regular as times went, and Barrot knew that his attempts to procure a reversal of the sentence by the Court of Appeal were foredoomed to failure. He accordingly took the bold and extremely unprofessional step of an appeal to the public through the press. With the powerful aid of Benjamin Constant, he succeeded in arousing a strong feeling of sympathy in favor of the condemned man, till the Chancellor, Pasquier, astonished at the intensity of the popular sentiment, summoned the intrepid advocate into his closet, and remonstrated with him on this employment of extra-legal methods in opposition to a "sovereign decree." The law, he added with severity, must take its course. "Unhappily," Barrott answered, "it is not in my power to hinder it." "Why," returned the Chancellor, sharply, "you have simply rendered the execution impossible." "I knew it," replied the other; "and it was the consciousness of that result which emboldened me." A few days later the death penalty was commuted to imprisonment; and the happiest day of Barrot's life was when, on the morrow of the Revolution of 1830, old Wilfrid Regnaud, at length set at liberty, came to thank him. Thus, indeed, we see that after-trial advocacy is sometimes excusable, and the zeal that out-

steps professional proprieties may be pardoned under extremely exceptional circumstances.

A singular incident in Sir Jonah Barrington's legal career may here be recalled. Mr. K. had been accused of a capital crime by Miss B., who stated that she had gone away with him for the purpose and in the strict confidence of being married the same day. The grand jury, on the young woman's testimony found a true bill against him, and he was put upon his trial at the Carlow Assizes. "He immediately," writes Sir Jonah Barrington, "came to me with a brief, said it was a mere bagatelle, and totally unfounded, and that his acquittal would be a matter of course. I had been retained against him. He made so light of the business that he told me to get up a famous speech against him, as, no doubt, I was instructed to do; that, indeed, I could not say too much, as the whole would appear on her own confession to be a conspiracy. On reading my brief I found that truly the case was not overstrong against him even there, where, in all probability, circumstances would be exaggerated, and that it rested almost exclusively on the lady's own evidence: hence, I had little doubt that, upon cross-examination, the prisoner would be acquitted. The trial proceeded. I was then rather young at the bar, and determined, for my own sake, to make an interesting and affecting speech for my client; and having no doubt of K.'s acquittal, I certainly overcharged my statement, and added some *facts* solely from invention. My surprise may be estimated when I heard Miss B. swear positively to every syllable of my emblazonment. I should now have found myself most painfully circumstanced, but that I had no doubt she *must* be altogether discredited. In fact, she was quite shaken by the cross-examination of the prisoner's counsel. I left the court as the jury retired. In about an hour I received an account that K. had been found *guilty*, and sent back to jail under sentence of death! I was thunderstruck, and without delay wrote to the Chief Secretary in Dublin, begging him instantly to represent to the Lord Lieutenant the real facts. Execution was, in consequence, respited. I waited on the Lord Lieutenant, stated precisely the particulars I have here given, and my satisfaction (even from my own brief) that the girl was purjured." We are told that the result of Sir Jonah's after-trial appeals was that, on Lord Chancellor Clare's recommendation, the sentence was changed to transportation for life; yet, poor Mr. K. had, after all, but little reason to be gratified with Sir Jonah Barrington's "famous speech." A volun-

tary yielding to what had appeared to be but a venial violation of professional proprieties had there brought about a deplorable catastrophe, and, in order to avert its graver consequences, the advocate was coerced to commit a further series of derelictions, for "guilt grows fast that was but choice before." Thus we see how paramount it is, in point of prudence, as well as of propriety, for an advocate to depart never so little from the strict precepts of professional obligation—following which, how rigidly soever, he is justified, but swerving wherefrom, even in the slightest degree, he commits himself to the unknown in circumstance, the indefinite in relation, the hazardous and dubious in ethics.

The unseemly occurrences which have just taken place in New York in reference to the Tweed case exhibit, in the strongest light, the obnoxious results of uncurbed professional zeal, and the danger of allowing those who have been professionally concerned in a case to protract discussion of it after its termination. Mr. Charles O'Connor, the foremost man at the New York bar, is at the head of the bureau of municipal correction, which organization is charged with the prosecution at law of the so-called ring thieves in the city of New York; and among the parties proceeded against under the direction of that bureau, was William M. Tweed. Tweed was brought to trial before Judge Davis, a justice of the Supreme Court, and was convicted, whereupon a cumulative sentence was pronounced. The Court of Appeals reversed the sentence. Judge Davis immediately threw himself into the arms of a newspaper interviewer. Nor was that all, for a correspondence in the *Tribune* ensued between the judge and Mr. O'Connor. It was begun by the judge controverting the legality of the decision of the appellate tribunal, which, he said, "failing to find any other authority for its decision, except quotations from an argument made by Mr. O'Connor some years ago, which it has since specifically repudiated and overruled, has endeavored to justify its present decision by bringing forward this rejected argument as its very spear and shield." O'Connor, in reply, writes, that, "when dealing with speculators, the Court of Appeals have been 'admirably astute' in the same uniform direction of impunity;" and that Mr. Tweed, "by using the courage of a Rinaldo, has, either in his own person, or through a representative, thrice bearded public justice in that high tribunal, and has, on each occasion, received its award, that, against him or his, the weapons devised by the people's advocates were vain and hurtless." As a remedy in the future for

this state of affairs, Mr. O'Connor does not advise more care in the preparation of their cases by the "thick-witted advocates for the people;" but, animated with the spirit of a crusader, he invokes "from the suffering class a determined resistance to the power by which they are enthralled, and an inflexible resolve to reform existing abuses." Mr. O'Connor then proceeds to account for this fearful state of affairs. He writes: "Because the local judges had, in most instances, received their offices through Tweed and his associates, the lawyers who were charged with the duty of prosecuting for the public, anticipated difficulty in the earlier stages of the suits; but they had no suspicion that like agencies had influenced the construction of the highest court. They felt assured that in all cases against the robbers, whatever might happen elsewhere, the judgment of that tribunal would not merely be in accordance with law, but that in pronouncing it the judges would be animated by an earnest love of justice and an active zeal for its advancement." He regrets that his assurances in this regard have not been realized. We actually find that Judge Grover was next interviewed by a *Tribune* reporter, on the subject of the O'Connor-Davis correspondence; but he stated he had not read the letters, and that "he did not regard it a proper thing for a judge to defend himself, or the court to which he belongs, against the strictures of any one who had been disappointed at a decision. Because this letter came from Charles O'Connor would be no stronger prompting to him to speak than if it came from a 'shyster,' or notorious charlatan. The court or the judge who found it necessary to speak in their defense, in such cases, had lost their usefulness." These repulsive proceedings, outraging all propriety, require no comment, for we should think that the bare record of them would suffice to excite a feeling of detestation in every mind. Mr. O'Connor's letter, indeed, as well observed by the *Albany Law Journal*, could only be justified by the precedent quoted on a certain occasion by Judge Grover, when off the bench. The judge said that out in Allegany a lawyer had but two things he could do when beaten in a cause; one was to appeal, and the other was to go down to the tavern and swear at the court.

With the ordinary termination of a suit the duties of an advocate should ordinarily terminate. If, indeed, Mr. Norwood's clause had been added to the proposed judicature act, there might have been some reason for entertaining a different opinion in some degree. As that clause was intended to carry with it an extension



of responsibility, it might become a matter of prudence and necessity for advocates, after an adverse termination of a trial, to endeavor, by every means in their power, to redeem its consequences. But so long as the relation of counsel and client inures according to its present constitution, it should be remembered that, even as the province of the law is to deal, not with what is infallibly true, but with what appears to be probably true; so, the province of the advocate is to present that which may justly appear to be true, and having done so, after final adjudication here, surrender to the ultimate tribunal beyond, the cognizance and determination of absolute truth.—*Irish Law Times*.

## Book Reviews.

### *I. TILTON'S CASE.\**

The celebrated Brooklyn Scandal Suit has been generally spoken of as the defendant's case, as it is in this Report of the trial by Mr. Abbott. We are not sure that such a nomenclature gives due prominence to the most important features of the case. The great celebrity of the defendant, and his conspicuous position in the church, have been allowed to fill the public eye, and to lead the public to esteem the defendant and his interests as the central figures in the case. In the light merely of dollars and cents, this may be correct. But the honor and happiness of the Tilton family, the interests of family circles, and the integrity of home and domestic relations, are surely of more consequence than the salary to be paid to any great preacher. The future life of not only Tilton the husband, but also of Tilton the wife, and of the junior Tiltons, are staked upon the issues which this case presents to the courts. In this view we have thought the more distinctive and descriptive title would be that of Tilton's case. At all events, this rose by any name would smell equally sweet.

Mr. Abbott's report of the first trial of this case will take high rank among the reports of noted trials, by reason of its evident accuracy of detail and the copious annotations of the legal questions arising in it. In both these respects the report is most unreservedly endorsed by Judge Neilson, who presided at the trial, and whose fac-simile letter in Vol. 1. says of the annotator's work: "These citations, some drawn from sources not open to every student or lawyer, sufficiently practical to show the state of the law on such questions, yet so special as to indicate many of its infelicities, conflicts and modifications, evince a rare and ripe culture, and tend to transform the report of the trial into a valuable book

\* Official Report of the trial of Henry Ward Beecher, with notes and references, by Austin Abbott, of counsel for the defense. Together with an account of the court, and biographical sketches of the judge, the parties, and their counsel, and some of the witnesses. Vol. 1. New York: George W. Smith & Co., 95 Nassau street. 1875.

of the law. But it required some discrimination and power of repression, a facile adaptation of the law to each particular topic, and some vivacity of expression, to intermarry so much learning with the report, without impairing its popular character. This difficulty the editor appears to have overcome." This is high praise, the justice of which cannot be fully tested until the whole work shall be before us. But we may call attention to the fact that in addition to many briefer notes, the 555 pages devoted to the trial proper are illustrated with five copious citations of authorities; one of which, on the question whether mere notice to produce papers at the trial makes their contents evidence, occupies a page and a half; and another, on the question of receiving proof to show the bias or hostility of a witness, occupies six pages. The volume closes with a note of five pages on the rules of pleading and the limits of the issue, in actions for adultery; all the annotations being closely printed. And the 133 pages devoted to the application for a bill of particulars and the various arguments and judgments thereupon, are interspersed with frequent and extensive citations of authorities, by both counsel and judges. One hundred and thirty pages are given to the empanneling of the jury, with a full report of the examination of all the jurors offered. This is the least valuable part of the report, and might, perhaps, have been omitted altogether. But even this portion contains frequent notes of authorities on the questions of competency of jurors and grounds of challenge, which may prove of value to some practitioners.

We have referred to these items of the editor's work to show that he has applied to this report the same industry and exactness which have made Mr. Abbott a favorite reporter and a model digester.

The publishers present in volume 1 a compact and well-bound book of 828 pages. The paper is fair, and the letter-press, though not perfect, is above mediocrity; a type being employed smaller than the profession would prefer, but this is rendered necessary by the great length of the case, the full report of which is expected to occupy four volumes.

We regret to see a work which bids fair to prove so valuable as a purely legal report, disfigured by the insertion of portraits and biographical sketches of the plaintiff and his counsel and witnesses. These are said to be given "in accordance with the general public desire;" but they add nothing to the value of the report to the profession, and are, therefore, but excrescences. What object can be attained by exhibiting in a law report the faces of the parties and

their counsel, and especially those of the jury, which are promised, it is hard to surmise, unless it be to pander to and stimulate a love for the sensational.

In these days of so much degeneracy among law-books, we ask of all publishers, reporters and essayists, the highest attainable excellency, integrity and purity in the preparation and production of new books to the exclusion of all adventitious features. We would read with pleasure the biographical references to Judge Neilson's legal and literary attainments, which accompany Mr. Abbott's report, if published elsewhere. But even these can add no value to the report of a trial before him as presiding judge, in the estimate of the profession, through whose eyes alone we view the subject. To the credit of Mr. Abbott's purity as a reporter, be it said, that the publishers exonerate him from and take upon themselves the responsibility of adding these "popular" features to a law book.

It is, therefore, not Mr. Abbott who says, at page xxvii., that the "sleuth-hound" characteristics of Mr. Morris, one of the plaintiff's counsel, once enabled him to secure, as public prosecutor, the conviction of a murdered man, of murder in the second degree. Whether he was expected to repeat this feat in the prosecution of Tilton's case, the biographer does not state.

A review of the opening volume of this report can be but partial; and we must defer till the completion of the work such a review of it as will give our readers a comprehensive view of the report of this case as an addition to our legal literature.

J. O. P.

MEMPHIS, TENN.

## II. WHARTON ON HOMICIDE.\*

Twenty years ago, Dr. Wharton published the first edition of his work on Homicide. The reasons which induced him to suffer it to remain out of print for several years, and which finally led him to the preparation of this edition, are thus set forth: "For some years after the exhaustion of the first edition of this work, I declined to revise it for republication. The topic, so far as it concerns its general principles, was discussed in my treatise on Criminal Law; and in the successive editions of that work the intermediate changes of the law in this respect are noted. The period, however, has now arrived, when, in view of the fact that the first edition of the Homicide is still frequently cited in the courts, its revision and correction are imperative. The importance of the interests at stake demands that the applicatory cases should be stated at large and critically scanned. The changes which the last few years have wrought in the juridical conception of the Law of Homicide are so fundamental, that it is proper not only that they should be correctly recapitulated, but that they should be fully discussed. Of these changes the following are the chief:

"1. That which treats malice and intent as inferences of fact and not as presumptions of law.

"2. That which regards insanity as a condition susceptible of many degrees, so that a man may be sane enough to be penally responsible, and yet not sane enough to form a deliberate intent; and which would, therefore, exact in such a case a conviction of such a grade of offense as does not imply malice or deliberate intent.

"3. That which holds that the defendant is to have the benefit of reasonable doubt, not merely as to the fact of guilt, but as to all the conditions essential to a conviction.

\* A Treatise on the Law of Homicide in the United States; to which is appended a series of leading cases. By Francis Wharton, LL. D. Second Edition. Philadelphia: Kay & Brother. 1875. pp. XLI. 794. Price \$6.50 net. Sold by Soule, Thomas & Wentworth, Saint Louis.

"4. That which holds that to sustain an averment of an intent to kill the deceased, evidence of intent to kill a human being must be produced; rejecting herein the old doctrine that a collateral felonious intent can be tacked to unintended homicide, so that a man, who, in stealing a fowl, accidentally kills the fowl's owner, can be held guilty of murder.

"5. That which brings out in full prominence, as the proper check on the modification last stated, the doctrine that negligence in the use of dangerous implements is in itself a misdemeanor, and that consequently he who, by the negligent use of a dangerous instrument, kills another unintentionally, is guilty, not, indeed, of murder, as the old law in some cases assumed, but of manslaughter, which the old law sometimes overlooked.

"6. That which adopts as the test of "apparency of danger" in cases of self-defence, the perceptions, not of an ideal reasonable man, but of the defendant himself.

"7. That which holds that between the defendant's malice and the deceased's death there should be established a casual connection, consisting of the sequence of ordinary and well-recognized physical laws.

"In the first edition of the present work the law in these relations was given as it then stood. Since then a more intelligent psychology and a more humane conception of jurisprudence have not only vindicated the modifications I have just specified, but these modifications, with greater or less completeness, have been adopted by the courts. I feel, therefore, that the time has now come when these modifications, with the reason and authorities which sustain them, should be wrought into the text of a systematic treatise. I am not content to accept them in brief, with the small proportionate space that can be allotted to them, in the current editions of my Criminal Law. I am still less content that the first edition of my Homicide should continue to be cited as sustaining doctrines now obsolete. I have, therefore, undertaken with no little interest the preparation of the present volume, in which, indeed, only partial fragments of its predecessor can be found. Since 1855, when the prior edition was published, not only have the great changes which I have noted been in progress, but the number of decisions applicable to the entire topic has trebled. These decisions I have incorporated in the text; and I feel able to say that I have thus not only given, as far as my ability permitted, the philosophy of the law, but that I have presented on each

point the rulings of the courts of England and of the United States down to within a few days of the present date."

We can well credit the above assertion of Dr. Wharton that in the present volume "only partial fragments of its predecessor can be found." No law book within our knowledge has been so thoroughly revised. Indeed, it would be difficult, without a careful comparison, to identify the present volume with its parent edition. Nor has this change been confined merely to the elimination of old, and the addition of new matter. During the last twenty years Dr. Wharton's method of constructing law books has undergone a considerable change. It is well-known that the first edition of his Criminal Law was little more than a digest of ancient common law authorities and of modern statutes and decisions. It was nevertheless a very useful and complete digest, and embodied what, after all that can be said, is the highest merit of an American or English law book, a tolerably accurate index to the state of the law, as it rests in legislation and judicial decisions. Scarcely had the reputation of Dr. Wharton's work on Criminal Law become established, when a formidable rival appeared in the same field of legal literature—a man born to think, and who could not discuss even a statutory question without following through it the thread of some real or supposed legal principle. To his mind a book which should embody simply what legislatures may enact or courts decide in a given epoch, or for a given state of society, without more, though useful for a time, would be useful only in a subordinate degree; and he did not hesitate to declare that such books would not *live*. Instead, therefore, of timidly hugging the shore of precedents, this writer boldly spread his sails, and ventured out upon the great sea of legal reason and truth, keeping only the tallest promontories and the boldest headlands in sight. His clear vision discerned as the foundation of all law certain principles of right which are always right, in whatever age and in whatever condition of society. These principles he sought to develop, and by them he tested with critical severity the law as it has been built up by legislatures and by courts. Wherever he found an *hiatus* in the law as it had been embodied in statutes and judicial decisions, he left no chasm in the road over which he was conducting his reader, but revealed to him beneath the ample groundwork of "principle" and of "legal reason."

In the presence of such a formidable competitor, or ally, whichever we may be privileged to call him, had Dr. Wharton merely

perpetuated his works as digests, they must soon have sunk to a position of secondary importance and gradually passed out of sight. For the vast industry of Mr. Bishop even surpassed his, in the gathering together of precedents; and the teeming foot-notes of the latter exhibit many decisions which are not to be found in the former. Nor was Mr. Bishop at all behind in the accuracy with which he brought to the surface, so to speak, what the courts had decided.

Whether stimulated by the example of such a co-worker, or whether from the natural bent of his mind, it matters little, but at all events Dr. Wharton has of late years put on his thinking-cap and extended his researches down into the original principles of the common law, and far out into the Roman and Continental jurisprudence. And thus, by the enlightened discussions with which the later editions of his works abound, and by exhibiting here and there comparisons between other systems and our own, he has enriched their pages and rendered them fascinating to the student.

The habit of reading the works of Continental jurists seems to have wrought a decisive change in his style as a legal text-writer, just as the constant reading of French authors contributed to form in Gibbon the peculiar style in which his immortal work is written. Outside of the British dominions and the United States, the doctrine of *stare decisis* appears to be unknown or slightly regarded; courts of justice, in delivering their judgments, do not cite previous decisions; and writers upon the law argue for the most part either from the provisions of codes or from acknowledged rules and from the principles of reason and justice. These habits give to the works of such writers a philosophical or speculative cast; and this peculiarity is detected frequently in the present work of Dr. Wharton.

We have examined with some care those parts of the present work which discuss the seven changes which, as Dr. Wharton tells us in his preface, "the last few years have wrought in the juridical conception of the law of homicide." We have closed the examination with the impression that, while the law of homicide has undoubtedly been undergoing a process of growth, the changes which Dr. Wharton indicates are not as extensive as the statements in his preface would lead the reader to suppose. In other words we mean to say, and without being disrespectful, that the "juridical sentiment" spoken of is for the most part Dr. Wharton's sentiment; and that, while the enacted and the decided



law have, without doubt, changed somewhat in some of the particulars he indicates, yet the changes have been for the most part changes in Dr. Wharton's theories and conceptions of the law. During the last twenty years his knowledge has been expanding, his views growing more humane, and his speculations more exuberant. We hope it will not be thought for a moment from what is here said that we do not regard his speculations as possessed of value. On the contrary, we regard them for the most part as eminently sound deductions, and we think that Dr. Wharton is entitled to the thanks of the profession for boldly moving forward ahead of the courts in several instances, and tracing a path which they must ere long follow.

1. The first change which Dr. Wharton notes in the juridical conception of the law of homicide, is that which treats malice and intent as inferences of fact and not as presumptions of law. This topic is discussed in §§ 669 and 671 of his text. The head line of the first section reads, "*Presumption of Intent—Abstract Malice not to be inferred from Abstract Killing.*" Dr. Wharton opens the section by admitting that in several opinions previously cited occurs the expression that when the mere act of killing is proved without anything more, malice is to be presumed. He then argues, and conclusively, we think, that no such thing as an abstract killing can be the subject of a judicial investigation, because some attending circumstances will always be developed in the proof; and hence that the doctrine that abstract malice is to be presumed from abstract killing, is absurd. "It is a speculation," says Dr. Wharton, "like the speculations of the old schoolmen from which it is taken, based on the supposition that there are abstract generic phenomena (*e. g.*, an abstract horse with abstract predicates); speculations which roam over all creation, without possibly touching any particular real case." Although Dr. Wharton claims that his position is virtually admitted in *Com. v. Hawkins*,\* by Shaw, Ch. J., and in *U. S. v. Armstrong*,† by Curtis, J.; and although he invokes in support of it *U. S. v. McClare*,‡ *Kingen v. State*,§ *Stokes v. The People*,|| and *Floyd v. The State*;¶ yet we apprehend that he shows us, not, indeed, a *change*, but merely a *tendency toward a change*, in the juridical sentiment on this question. But in pressing for the consummation of that change, we are with him heart and soul.

\* 3 Gray, 463.

‡ 45 Ind. 518.

† 2 Curtis C. C. 446.

‡ 53 N. Y. 164.

‡ 17 Bost. Law Rep. 439.

¶ 3 Heisk. 342.

2. "That which regards insanity as a condition susceptible of many degrees, so that a man may be sane enough to be penally responsible, and yet not sane enough to form a deliberate intent; and which would therefore exact in such a case a conviction of such a grade of offence as does not imply malice or deliberate intent." The enunciation of such a proposition is calculated to arrest the attention. Malice in law means, briefly, *wickedness*;\* and the proposition therefore is, that a person so insane as to be incapable of forming a deliberate intent, and not subject to the imputation of wickedness, may yet be responsible for crime in a degree which the law will recognize and punish otherwise than by confinement in an insane asylum. It will be at once suggested to the mind that this doctrine would make a babbling infant, to whom we could impute neither an evil intent, nor any other intent, punishable for crime in a court of justice. We, therefore, turn curiously to the text to see if any court<sup>†</sup> has announced a doctrine so *advanced*; and there we find at § 584 the doctrine announced in capital letters that "mental derangement, though not constituting total insanity, may be put in evidence to lower the grade of guilt." We could wish that this proposition were the recognized law. We know that in the case of drunkenness an analogous principle prevails, which may be formulated thus: If a man is so drunk as to be incapable of forming a deliberate intent when he commits a homicide, the fact of such drunkenness may be given in evidence for the purpose of reducing the grade of the crime to murder in the second degree.† But Dr. Wharton has cited no adjudication sustaining the proposition, so far as it embraces insanity, and we conclude that there is none. He, however, cites an English writer on Criminal Law, Mr. Fitzjames Stephen. But Mr. Stephen's view, like Dr. Wharton's, rests on his own unsupported reasoning; and the comparison by which he illustrates the principle for which he contends is so quaint that we can not avoid reproducing it. "Partial insanity," says Mr. Stephen, "may be evidence to disprove the presence of the kind of malice required by the law to constitute the particular crime of which the prisoner is accused. A man is tried for wounding with intent to murder. It is proved that he inflicted the wound under the delusion that he was breaking a jar. The intent to murder is disproved, and the prisoner must be acquitted; but if he would have had no right to

\* Whart. on Hom. 2d Edition, §§ 18-29.

† Roberts v. People, 19 Mich. 401.

break the supposed jar, he might be convicted of an unlawful and malicious wounding."\* Now we are quite prepared for the statement, to put it in phrase which has become classic, that if a man is but "mad north-northwest"—that is to say, if at the time of committing the assault he is enjoying a lucid interval, or if at that time he is merely laboring under an hallucination wholly disconnected with the subject and circumstances of the homicide, he should be held responsible; but if his mental faculties are so far upset that he does not "know a hawk from a hernshaw," even "when the wind is southerly"—if he can not in broad day-light tell a man from a candy-jar, we apprehend that an American jury would be apt to cut the Gordian knot by acquitting him altogether; although it might be different in England, "for there the men are as mad as he." Really it should seem that a writer who, with so much good sense, insists upon discarding the subtleties of the scholastic jurists, should not lead us into such subtleties as these.

Dr. Wharton also cites, in support of the position he here takes, another writer of repute, namely, himself, in 1 Wharton & Stillé's *Medical Jurisprudence*, §§ 126, 181, 200. Turning to those pages, we find the same doctrine reiterated without any citation of adjudications sustaining it. We find, however, in a note on p. 206 of this last named volume, a statement which possibly furnishes a key to the unqualified language in which Dr. Wharton has stated this supposed rule of law. The author of the language therein quoted is no less an authority than the celebrated Dr. Hammond of New York. He tells us that it often occurs that the mind, by constantly entertaining the most preposterous ideas, finally accepts them as true. Now, although the proposition which we are discussing may not be a "preposterous" one, yet it was a great fault in Dr. Wharton to have laid it down in positive terms as though it had been a rule of adjudged law; and we can only account for his having done so on the supposition that, it being a favorite idea of his, he has reiterated it so often in his various works that he has come to regard it as a well settled rule. Text writers can not be too careful to distinguish their own speculative deductions, however conclusive they may seem, from conclusions which have been reached by the authoritative tribunals.

3. The third change which Dr. Wharton tells us has taken place within the last few years in the juridical conception of the law of homicide, is "that which holds that the defendant is to have the

\* *Stephen Cr. Law* (1863), p. 92.

benefit of reasonable doubt not merely as to the fact of guilt, but as to all the conditions essential to a conviction." We do not take the distinction between "the fact of guilt" and "the conditions essential to a conviction." If these latter are wanting, the "fact of guilt" must be wanting also. On turning to the sections of his text, which Dr. Wharton refers to as exhibiting this change, we find, indeed, a valuable discussion of the doctrine of "reasonable doubt;" but no pains are taken to point out to us any recent change in this branch of the law of homicide. We infer, however, that the case of *The People v. Garbutt*,\* and a large number of other cases which hold that where the defence succeeds in raising a reasonable doubt of sanity, the jury must acquit, embody a modern doctrine. And we believe that the same rule ought to obtain where self-defence or any matter of excuse or extenuation is urged. Thus, if the jury are in reasonable doubt only as to the existence of premeditation, they should find against its existence and convict of murder in the second degree. If they are in reasonable doubt only as to the existence of malice, they are to find that there was no malice, and convict of manslaughter. Thus far, as Dr. Wharton shows, the decisions have already gone. But why not go further, and say if there is a reasonable doubt whether the killing was done through heat of blood or in necessary self-defence, they are to find that it was in self-defence, and acquit altogether? But here we are met by many courts with the subtlety of *extrinsic defences*. We are told that what is loosely termed "the plea of self-defence" (for there is no such formal plea), being a sort of plea of confession and avoidance, it is an extrinsic, substantive matter, which must be proved by a preponderance of evidence, and, according to the English decisions, beyond a reasonable doubt. There is no sense in this. The "plea of self-defence" introduces into the case a condition, the *negative* of which, if the prisoner was originally without fault, is necessary to a conviction of a felonious homicide. If, therefore, the defendant's testimony raises a reasonable doubt in the minds of the jury as to whether this condition did exist, the prisoner should have the benefit of such doubt, and the jury should acquit. The doctrine of extrinsic defences is a delusion well calculated to cloud the minds of an ordinary jury, since it seems to produce this effect upon some courts. For instance, to tell a jury, as some courts do, that if, *upon the whole case*, they have a reasonable doubt of the defendant's guilt,

they are to acquit, and then to tell them in the next breath that the "plea of self-defence" must be made out by a preponderance of evidence, is either a downright contradiction, or else it means that in order to acquit, the jury must have a reasonable doubt *on every point of the case*.

4. As to the fourth recent change in the juridical conception of the law of homicide which Dr. Wharton points out. If A. shoots at B., maliciously intending to kill him, but misses him and accidentally kills C., a bystander, the common law adjudges him guilty of murder "in respect of the original intent;" that is, by an easy fiction, it transfers the malice against B., over against C., and thus makes out the crime of murder. With regard to the propriety of this doctrine of transferred imputation, or *aberration*, as it is termed in the Roman law, Continental jurists appear to be divided. Two, whom Dr. Wharton cites, Buri and Walther, argue that A.'s action in both relations is to be viewed as a unit; that as his intent was to kill, and as the killing took place in pursuance of this intent, the case is analogous to that of a man shooting into a crowd, intending to kill any one whom he may hit, in which case no one doubts that he is chargeable with the murder of the person whom he kills. This view is combated by Bar in his Treatise on Casual-zusammenhange, with great, and it would seem, conclusive force of reasoning. He shows that the case stated is not analogous to the case of firing into a crowd, because here there is a general intent to kill some one in the crowd, leaving the selection to chance, and if any one in the crowd is hit and killed, this intent is specifically carried out, and there is no *aberration*. Carrying out his analysis, it shows that the case first supposed consisted, at most, of two distinct crimes, neither of which is murder: 1. An *attempt* to murder B., which was unsuccessful; that is, an assault with intent to murder; and, 2. A negligent killing of C., that is to say, involuntary manslaughter. Therefore, in punishing him for murder, we punish him for a higher crime than he is strictly guilty of. Dr. Wharton, while concurring with the views of Bar, admits that the common law rule is "too well settled to be shaken." We suppose no one would seriously wish to shake it; since it results in the doing of substantial justice, without the inconvenience of trying the offender for two distinct offences. In the eye of justice the man who attempts to kill one man, and failing, accidentally kills another, is as guilty as though he had succeeded in killing the first.

But Dr. Wharton perceives a change in the juridical conception of the law of homicide, where the common law extends this doctrine to cases where homicide is accidentally committed in the perpetration of other felonies. Leaving out those cases which arise under American statutes which declare that homicide committed in the perpetration of rape, robbery, arson or burglary shall be murder, Dr. Wharton shows that there is reported no modern conviction of murder in a case where there was no evidence of malicious intent towards the deceased, and in which the felonious intent proved was simply an intent to commit a collateral felony. In fact the English judges, instead of applying this rule of law, generally furnish juries with some hint by which they may evade it. Mr. Fitzjames Stephen and Baron Bramwell, in their testimony before the Homicide Amendment Committee in 1874, strongly opposed its continuance; and Lord Macaulay, in his report on the Indian Penal Code, showed by the incisive reasoning of which he was so great a master, that such a rule confounds all the boundaries of crime. Dr. Wharton argues strenuously against it, but does not exhibit any American adjudication in which a disposition is shown openly to repudiate it. It seems to be, however, a fit case for the application of the maxim *cessante ratione, cessat ipsa lex*. It had its origin at a time when all felonies were punishable with death. Thus, to take the case most frequently put in the old books, that of the man who, in attempting to steal a fowl, accidentally killed its owner and was adjudged guilty of murder; the stealing of the fowl, if consummated, would have been a capital felony, and the old jurists loosely transferred the felonious intent as to the attempted crime over to the homicide, and made a capital crime of that. This doctrine could not, it would seem, in the absence of statutes, be excusably perpetuated, except where the homicide is accidentally committed in the perpetration of some crime which is still capital, as in case of treason.

5. As to the *fifth* change which, according to Dr. Wharton, the last few years have wrought in the juridical conception of the law of homicide, we may briefly say that we have examined his text and find no such change exhibited or hinted at.

6. The *sixth* change noted by Dr. Wharton, is "that which adopts as the test of apparenecy of danger in cases of self-defence, the perceptions, not of an ideal reasonable man, but of the defendant himself." In order to understand the nature of the "ideal reasonable man," to which Dr. Wharton here alludes, it will be nec-

essary to quote at some length from his text, which we do, beginning at § 493:

"Whether the danger is apparent is to be determined from the defendant's standpoint. Here, no doubt, we arrive at a point where begin marked divergencies of judicial sentiment. It is conceded on all sides that it is enough if the danger which the defendant seeks to avert is *apparently* imminent. But apparently as to whom? Here three theories meet us: The first is that the standpoint is that of the jury. No doubt in a primary sense this is correct. The jury must judge whether the danger was apparent; but it is absurd to say that it is necessary that the danger must have been such as to be apparent to themselves as they deliberate finally upon the case. If this were true, an unloaded pistol would cease to be an apparent danger; for the jury, when they come to decide the case, know that the pistol was not loaded, and know that there was no real danger. Hence, what the jury have to decide is, not whether the danger was apparent to themselves, but whether it was apparent by some other standard.

"The answer given by several of our courts to this question is, that if a 'reasonable man' would have held that the danger was apparent, then the danger will be treated as apparent. In other cases it is varied; it being said that when the danger is 'reasonably apparent,' then it is apparent. We are therefore to infer that if a man of ordinary reason would consider an apparent though unreal danger to be imminent and real, then it is a good defence; but that to constitute a good defence, it is necessary that the danger should have been such as to have been considered as imminent and real by a man of ordinary reason."

So far, so good. Dr. Wharton states very fairly a view which has been taken by a decided majority of the courts, and which has been enacted by the legislatures of several of the states and territories. Properly understood, we think that no exception can be taken to this rule. It simply means that when the jury are put in possession of all the material facts; when they are able to see things precisely as the defendant saw them, guided by all the knowledge of the strength and character of the assailant and of his previous hostility or threats which the defendant possessed; and when the appearance of the assault is fully depicted before them;—they shall then say by their verdict whether the defendant *ought* to have had, or, in other words, whether "a reasonable man," under the precise circumstances would have had an apprehension

of immediate violence amounting to death or great bodily harm ; or, to put it in still another form of expression, whether his conduct was *reasonable* and hence justifiable, or whether it was unreasonable and hence culpable. Primarily, as Dr. Wharton states, the standpoint from which this question is resolved is that of the jury. The "reasonable man" becomes, then, each individual juror himself ; and the whole effort of the court in the trial of such a case should be to put each juror, in imagination, as nearly as may be, in the place of the accused at the time he struck the fatal blow. We have not space to cite the numerous cases which converge, with greater or less directness, toward this view. They have been spread out at length and fully discussed in Horrigan & Thompson's *Cases on Self-Defence*. Dr. Wharton has also quoted from them, in the present work, at great length.

So much for the "reasonable man" of the courts and the statutes. But the "reasonable man" which Dr. Wharton has in his mind's eye is one of a very different sort, as will be seen by the next paragraph. "But who," says he, "is the reasonable man who is thus invoked as the standard by which the 'apparent danger' is to be tested? What degree of 'reason' is he supposed to have? If he is a man of peculiar coolness and shrewdness, then he has capacities which we rarely discover among persons fluttered by an attack in which life is assailed, and we are applying therefore a test about as applicable as would be that of the jury who deliberate on events after they have been interpreted by their results. Or, if we reject this idea of a man of peculiar reasoning and perceptive powers, the selection is one of pure caprice, the ideal reasonable man being an undefinable myth, leaving the particular case ungoverned by any fixed rule. And that this ideal reasonable man is an inadequate standard, is shown by a conclusive test. Suppose the ideal reasonable man would at the time of the conflict have believed that a gun aimed by the deceased was loaded, whereas, in point of fact the defendant knew the gun was not loaded ; would the defendant be justified in shooting down an assailant approaching with a gun the defendant knows to be unloaded, simply because the ideal reasonable man would suppose the gun to be loaded? No doubt that in such a case no honest belief of the ideal reasonable man would be a defence to the defendant who knew that the belief was false, and that he was not really in danger of his life. And if the belief of the ideal reasonable man is not admissible to *acquit*, *a fortiori* is it admissible to *convict*?"



To those familiar with the adjudications on this subject, we need scarcely suggest that the "ideal reasonable man" thus depicted is purely one of Dr. Wharton's own creation. We have never met an adjudication nor a line in any work on criminal law, in which an "ideal reasonable man," disconnected from the defendant, not himself assailed, a mere looker-on, possessing a different degree of knowledge as to the character and purposes of the assailant, has been set up as the standard by which to determine the defendant's guilt or innocence. Dr. Wharton's "ideal reasonable man" is, therefore, not that of the courts or of the text writers. It is simply a phantom which he has conjured up from the misty depths of his own imagination, and against which he seriously argues to the length of forty mortal (or immortal) pages. He does not, indeed, attack this hobgoblin as fiercely as Don Quixote charged the army of Alifanfaron, but in treating him as a thing which exists at all, he labors under an equal delusion.

But these forty pages are by no means destitute of information. In them he brings out very fully the views which the courts have declared with respect to the question, although he is constantly endeavoring to weave them into an argument against this "ideal reasonable man." To show how thoroughly he seems to have become imbued with the idea that some one has invoked an ideal reasonable man entirely disconnected from the defendant, by which to judge that defendant, we may quote the following passage: "So, Chief Justice Breese tells us in Illinois that the doctrine established by that court is 'that a man threatened with danger must determine from appearances, and the actual state of things surrounding him, as to the necessity of resorting to self-defence; and, if he acts from reasonable and honest convictions, he will not be responsible, criminally, for a mistake as to the extent of the actual danger, where other judicious men would have been alike mistaken.' But does this mean judicious men acting with the defendant's lights, or ideal judicious men?" We answer that it means judicious men acting with the defendant's lights, and, we presume, no one except Dr. Wharton ever imagined that it could possibly mean anything else.

Dr. Wharton sums up the law of this question in apt language when he says (§ 537), "When a man kills another in an honest error of fact, murder is out of the question. The only issue is, was this error negligent or non-negligent? If negligent, the killing was manslaughter. If non-negligent, excusable homicide."

But what is negligence? We may answer, in the language of Alderson, B., in *Blyth v. Birmingham Waterworks Co.*,\* language which, as Dr. Wharton tells us in his work on Negligence (§ 1) has been frequently cited with approval by the courts, that it "is the omission to do something which a *reasonable man*, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and *reasonable man* would not do." Thus it is seen that the concluding words of our author's elaborate argument call up by their very reverberations the "reasonable man" of the courts, who, like Banquo's ghost, confronts the learned Doctor and challenges him to deny his existence.

But we apprehend that the only practical importance attaching to a discussion of this question, relates to another question which grows out of it. If the defendant's justification is to depend upon *his own perceptions* of the magnitude of the danger, in the strict sense for which Dr. Wharton contends, it would be obviously proper to admit evidence of any peculiarity of his mental or nervous constitution which would be likely to distort those perceptions and make them different from those of ordinary reasonable men. We understand Dr. Wharton to favor the admission of such evidence. He quotes Berner, a German jurist, whom he styles "authoritative," who tells us that "whether the defendant actually transcended the limits of self-defence can never be determined without reference to his individual character. An abstract and universal standard is here impracticable. The defendant should be held irresponsible [of malicious homicide] if he defended himself, to the extent to which, according to his honest convictions, as affected by his individuality, defence under the circumstances appeared to be necessary." We recall but one case where the question whether such evidence ought to be admitted has been directly passed upon, and that is the case of *Shoultz v. The State*.\* In that case it was held proper, in a trial for murder, to refuse testimony to the effect that, owing to his weak and crippled condition of body, the defendant was rendered nervous and peculiarly sensitive to fear of external violence. Upon principle, we should suppose that there might be cases where such testimony ought to be admitted. It is true that the fact that a homicide was committed through the cowardly fears of the defendant, where there was no reasonable ground to apprehend death or serious bodily harm, will not wholly

\* 11 Ex. at p. 784.

† 25 Mo. 128, 149.

excuse its commission, as in self-defence. This has been settled by a great number of cases, overruling, or at least qualifying, Grainger's case.\* If cowardice could so excuse, nothing would be more reasonable than to permit the defendant to prove that he was a coward. There may be cases, however, where the evidence as to the *res gesta* leaves it in doubt whether the slayer acted from malice or from fear. In such a case, to render the latter hypothesis more probable, and reduce the offence to the grade of manslaughter, it might be admissible to permit him to prove that he was peculiarly susceptible to fear. In Shoultz's case (*supra*) the evidence did not leave the question in doubt. It was clearly a case of premeditated murder.

In expounding the law of self-defence in his work on Criminal Law (§ 1020), Dr. Wharton lays down the proposition, that "to make homicide excusable on the ground of self-defence, the danger must be *actual* and urgent." The italics are ours. This rule was quoted as embracing the correct doctrine in Thompson's case.† In the subsequent case of Neeley v. The State,‡ the same court held it not erroneous to charge the jury that "to sustain the plea of self-defence the defendant must show that Patrick Casady assailed him, and that the assault was eminently perilous, and the danger to the defendant *actual* and urgent." The court said that the word "*actual*" in this connection was to be understood as meaning, not actual in fact, but actual to the defendant's comprehension. Notwithstanding this language of Dr. Wharton had been sanctioned by so eminent a court, the editors of the Cases on Self-Defence ventured to criticise it as calculated to mislead a jury of plain men.§ The rule is, as stated by Dr. Wharton elsewhere in his works, that *apparent* danger excuses; and the writer of the criticism referred to could not see how *actual* could be construed to mean *apparent*. To this criticism, Dr. Wharton, in the work before us, puts in the following plea of *confession* and *avoidance*: "No doubt the bare assertion that the danger must be '*actual*' is indefinite, and the standard by which such actuality is to be determined should be at the time stated; but it must be remembered that the term '*actual*' always involves relativity, unless, indeed, we accept the realistic philosophy now so long exploded. A danger is '*actual*' not because it really *exists*, for we have no senses

\* 5 Yerger, 459; S. C. Hor. & Tho. Cas. Self-Def., 238.

† 9 Iowa, 188; S. C. Hor. & Tho. Cas. Self-Def., 92.

‡ 20 Iowa, 108; S. C. Hor. & Tho. Cas. Self-Def., 96.

§ Hor. & Tho. Cas. Self-Def., 104.

absolutely to determine the objective existence of phenomena, but because it is really *believed* to exist. \* \* \* It is enough now to say that either we must banish the terms 'actual' and 'real' entirely from juridical use, or we must employ them in their relative sense,—*i. e.*, 'actual' or 'real' because appearing to be such to a particular observer, and, in issues like the present, to the person accused." It is enough for us now to say, in reply to the above, that if a danger is *actual* merely because it is *believed* to be actual,\* then the words *danger* and *fear* become synonymous, and we might as well abolish dictionaries from juridical use.

7. The seventh change which Dr. Wharton conceives the past few years have wrought in the juridical conception of the law of homicide, is "that which holds that between the defendant's malice and the deceased's death there should be established a casual connection consisting of the sequence of ordinary and well recognized physical laws." On this subject Dr. Wharton furnishes an elaborate chapter entitled "Casual Connection." We arise from the perusal of it with the impression that the principal changes which the last few years have wrought with reference to this question relate to the growth of Dr. Wharton's own perceptions of it. The preparation of his recent work on Negligence must have drawn his mind into the study of this subject in an especial degree. If this chapter exhibits, in places, reasoning which seems somewhat involved and speculative, it is because such reasoning can not be disconnected from the subject. Most of it is, however, of a character eminently practical, consisting of illustrations drawn from the adjudications; and on the whole it is one of the most interesting chapters in this most interesting work.

Other instances could be added to those already named in which Dr. Wharton resolutely pushes aside old opinions or demolishes old errors; as, for instance where he shows that there is no such thing as *express* malice, but that all malice is *implied* by a process of reasoning from the existence of certain facts. The conservative lawyer will recoil with a pious shudder from such a remorseless destruction of the old images; but his more radical brother will applaud the Great Innovator, as often as he sees

"—— from falsehood torn

Some old grey keystone, and hurled down with scorn.

The "*scorn*," however, must be supplied by the reader; is not traceable in Dr. Wharton's writings. His mind is eminently candid and judicial; and when his reasoning triumphs over an old error,

the reader feels that it is the triumph of the *truth* and not the *man*. Rejecting as *surplusage* some of his more recent speculations, his works are, without doubt, among the most valuable contributions to the law which the present century has afforded. Our profession and country owe a deep debt of gratitude to him. His influence will be felt in the growth of jurisprudence long after he shall have passed away. May he live to number the years of Lord St. Leonards, and every lustrum bring forth a new work on some of the titles of the law!

### III. OTHER BOOKS RECEIVED.

1. DESTY'S FEDERAL PROCEDURE.—A Manual of Practice in the Courts of the United States. Embracing the Revised Statutes of the United States relating to federal courts and practice therein, together with the Rules and Orders promulgated by the Supreme Court of the United States, and the latest Amendments thereto. With notes referring to Decisions of the Federal Courts. By ROBERT DESTY, Attorney at Law. San Francisco: Sumner Whitney & Co. 1875. 18 mo. pp. 447. Fine type, set solid. Flexible covers. Price, \$4.00 net.

This work is what its title indicates, a compilation of the statutes and rules regulating procedure in the courts of the United States, with notes referring to decisions construing them. It has what appears to be a very full index.

2. BROWNE ON INSANITY.—The Medical Jurisprudence of Insanity. By J. H. BALFOUR BROWNE, Esq., of the Middle Temple and Midland Circuit, Barrister-at-Law, Register to the Railway Commissioners, author of the "Law of Carriers," "The Principles of the Law of Rating," "The Law of Usages and Customs," "Responsibility and Disease," etc. Second edition, with references to Scotch and American decisions, etc. 1 vol. 8 vo. pp. 713. San Francisco: Sumner Whitney & Co. 1875.

This work was received too late to enable us to notice in this number in such a manner as the importance of the subject deserves, and we reserve it for a fuller notice in our January number. We may state, however, that in this edition it has been greatly enlarged, and many American cases examined. The author differs with Dr. Ray on many questions, and it is frequently said that

while the *defence* in criminal trials find more encouragement in Ray, the *prosecution* must have Browne. This edition, though printed in a city where a quarter of a century ago there were but four houses, will not, in its typographical appearance, do discredit to the learned author, and we trust he may derive a handsome income from the sale of it in this country.

3. SMITH'S COLLECTION COMPENDIUM.—Compiled for the use of Lawyers and Business Men generally, containing a New and Original System for the Collection of Claims at all points in the United States, Canada, etc., upon stipulated rates of percentages, without the aid or intervention of a third party; a Digest of the Laws of every state pertaining to Collections, together with the Court Calendars, and instructions for proving and forwarding Claims for Collection; a Digest of the Bankrupt, Patent, Trade-Mark and Copyright Laws, together with the Banking Laws of the United States, and a reliable List of Banks and Bankers. For the year ending September 1, 1875. E. A. SMITH, Author and Compiler. pp. 600. St. Louis: Riverside Printing House. 1875. Price, postage prepaid, \$6.00.

Want of space, as well as of time for thorough examination, prevents us from saying more than that the plan and purposes of this work are novel and attractive; and if it shall prove practicable, it will become exceedingly valuable, not only to the legal profession, but to the mercantile community at large.

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\*.\* We would thank publishers who send us books for review, to acquaint us with the net prices of them.





John A. Wilson



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LAW REVIEW.

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NEW SERIES.

VOL. I.

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## Original Articles.

### *I. THE EARLY FRENCH BAR.*

In the earlier period of the French bar the proceedings in the ecclesiastical courts were conducted wholly in the Latin language; in the secular courts the vulgar tongue alone was used; but the technical terms of the law, the pedantry and affectation of lawyers and judges, rendered their speech nearly, if not quite, incomprehensible to the public at large; so that the French that was heard in the courts was as different from that of the common people as was that of the prioress of Chaucer:

" And French she spake full fayre and fetisly,  
After the scole of Stratford atte Bowe,  
For French of Paris was to hire unknowe."

Thus when, in 1393, the kings of England and France were treating for a truce, the English commissioners could not understand the language of the French lawyers who represented their adversary; and Froissart says that the English excused themselves in the discussion by saying, "that the French which they had known from infancy was not of the same nature and condition as that which the clerks of law used in their treaties and proposals." As the English of the higher classes of that day, such as would be selected for agreeing on

a truce with the enemy, generally understood French quite as well as their own language, it would seem that the dialect of the bar of which they complained must have been peculiarly barbarous and uncouth. Such, however, was the fashion of the age; science and learning of all kinds veiled themselves in obscurity, and sought to enhance the popular respect by an air of profound mystery.

At a time when the spiritual courts engrossed a large part of the legal business of the country, and when causes in the civil courts were often tried by wager of battle, the demand for lawyers was limited; the functions and station of lawyers were somewhat uncertain, and the bar could hardly claim the dignity of being a separate institution. In the ecclesiastical courts, the preparation, management and trial of causes was entrusted to persons who had taken clerical or priestly orders; a class of men who, however, not being content with this exclusive privilege, appeared also as advocates in the secular courts, notwithstanding there was a rule, more often broken than kept, which forbade them to appear except in their own courts, unless in cases where the interests of the church were concerned; a wide and vague exception, since it might be asserted that the church was concerned in all questions touching good morals, which are in some way involved in nearly every judicial proceeding. The superior learning of the clergy, joined to the veneration in which they were held by the people, gave them great advantages in enabling them to intrude themselves into the secular courts, where they affected to appear less in the guise of partizans than as defenders of morality and religion. Some of these made the practice of law a regular pursuit; they possessed ability and sometimes achieved distinction; at least one of them became a bishop and another a pope. They had a double chance of promotion, from the crown and from Rome. Since we perceive that the secular lawyers adopted the style of the spiritual brethren, and accepted their canons of taste, there is reason to suppose that the influence of the latter outweighed that of the former; but there is but little or no evidence extant of any hostility growing out of the rivalry of these two orders, which might other-

wise have been brought forward as a reason for the fact that in all the subsequent and long protracted struggles between the crown and the Roman See, the bar uniformly ranged itself on the side of the crown. At first, no doubt, the clergy found a pretty easy victory over lawyers deficient in learning, practicing before ignorant courts; but as the laws and recognized customs of the country increased in number, and grew more diversified in detail, it became more and more difficult to keep up with the rules of decision under two different codes of laws; the result of which was that the clergy were gradually forced to recede to their own tribunals.

The French bar, as understood in modern times, traces its lineage to the ordinances of St. Louis, dated in 1270, which prescribed in some measure the duties of advocates. Three things were required of them, loyalty, courtesy, disinterestedness. It seems that it required such a quantity of words to display these three qualities that it soon became necessary to add a fourth; for, in a very few years later, brevity was also strictly enjoined; and this last quality appeared to be the most difficult of all to be attained. Before the close of the thirteenth century a magistrate gave the following charge to the bar: "Good method is needful to advocates, and to all sorts of people who have to plead for themselves, or for others; and when they set forth their pleas they should compress the facts in as few words as they can, the contention being, however, all comprised in the words; for the memory of man retains more easily a few words than many, and they are more agreeable to the judges who receive them." Time and again the courts renewed the protest against that prolixity which in early times seemed to be almost inseparable from the law, and which in a variety of forms still adheres to it. There is something even pathetic in the appeals of judges, who must have suffered much against the prevailing redundancy of the pleadings, written and oral. Advocates were implored "to leave off all digressions in order that they might go straight to the material points, to avoid useless replies and repetitions, not to employ subterfuges and circumlocutions," which then, for the first time, began to be called chicanery.

Then, as if all patience were well nigh lost, the charge proceeded to recommend to the bar that "in speaking they should not open their mouths inordinately wide; neither should they gesticulate at random with their heads and feet; nor disfigure their faces with contortions; nor display a great pomp in small cases; in short that their voices and discourse should be in harmony with the subject on hand."

In those days the court of Parliament and the advocates practicing in it, who were divided into consulting advocates and speaking advocates, followed the king in all his movements; and hence was brought about a graduation of fees based in some degree, curiously enough, on the style in which the advocate travelled. A writer of that age says, "Their salary is regulated by days, according to the importance of the affair, according to their learning and their estate; for it is not reasonable that an advocate who goes on horseback should receive as large wages as one who travels with two horses, or with three or more." It would appear, therefore, that a one-horse lawyer was at the lowest grade of the profession.

The fees do not seem to have been very large, and we are told that often the lawyers pleaded without pay for relatives, "or for the poor, in the name of our Lord." They were forbidden by the rules of the order to refuse their services in defence of a party who was indigent or oppressed, under penalty of expulsion from the bar. If a lawyer practiced without pay, no oath of office was administered, but he could not charge any fees until he had taken an oath of office "to maintain himself in the office of advocate well and loyally, and not knowingly to sustain any but a good and loyal cause."

It must not be supposed that when a cause was to be tried by wager of battle the lawyers had nothing to do with the case; for the allegations on either side were drawn up by lawyers, so as to form a regular issue; and these allegations were read on the ground before the parties engaged in the combat. But here the place of the lawyer was quite subordinate; and as all the persons present would probably be anxious for the fight to begin, he was specially admonished,



in matters of this kind, to be brief, and to see that his language was direct. It was also needful that he should speak with such prudence and discretion as to say nothing of his own motion tending to injure or insult the adverse party; for if he should do so, he ran a great risk of becoming a principal in a like contest, in which he would require the presence of some other lawyer to perform a similar service for himself; and at least one instance is recorded where an advocate, who was performing a professional duty of this sort, was called into the field, on wager of battle, for some unlucky word which he had inserted in his pleadings; though it is said that he got off with a good scare. The odds between a lawyer, who had probably never put on a coat of mail in his life, and a knight, who had been accustomed to all military exercises from his infancy up, were obvious enough. According to the theory, indeed, this inequality was a matter of no significance, since Heaven was supposed to fight on the side of the right, and to overthrow the wicked; so that all the champion of innocence had to do was to go through the motions of a combat, in the serene confidence that his humble efforts would be rendered effectual by supernatural aid. It would seem, therefore, that the lawyer in question was a little skeptical on this point, or else that he was too modest to expect the divine interference in his behalf.

The same barons who settled their disputes by the short arbitrament of the sword, sat in judgment between parties who preferred a more peaceable solution of their controversies. Whenever they happened to be in Paris they sat as judges, if it so pleased them, in the Court of Parliament. Fancying, as ignorant men not uncommonly do, that they had a great knack of deciding cases, they rarely missed a favorable opportunity of assuming a place on the bench. Their opinions are not cited, because they gave none. Their preference was to decide in favor of the plaintiff or defendant, with but little discrimination as to details; but as sometimes nothing could be done without recourse to writings and figures, there were connected with the court certain learned men of the law, who acted as private advisers to the judges in matters of

unusual difficulty. In the course of time these jurisconsults, as they were called, were occasionally requested to sit on the bench with the judges for the convenience of consultation and the better dispatch of business ; and it came to pass at last that they acquired the right to sit there, as it were by prescription, and to hold the court alone when its barons were absent, as they were for the first time during the long wars of the reign of Charles VI. Their absence enabled the administration of justice to assume a more regular form, and the law to acquire a more settled accuracy. In the course of time the barons found themselves unable to keep up with these changes, which made the rude country barons ridiculous where they had formerly been distinguished for ease and readiness of decision ; and as they were not disposed to learn new things, they gradually withdrew from a court which they were no longer qualified to adorn. Thus, as the lawyers had managed to exclude the clergy from the bar, they at last supplanted the barons on the bench ; a result which the latter accepted only with feelings of deep jealousy and resentment, yielding reluctantly to an influence which they could not exactly understand.

After the Court of Parliament of Paris was made sedentary in that city by an edict of Philip the Fair, the bar began to take on more regular functions ; and it rapidly developed into its modern form, and acquired its modern attributes. From that time the more able, learned and eloquent members of the bar, entering upon a more unimpeded career, rose fast to wealth, influence and distinction ; but for a long time their personal safety was extremely precarious. One of the earliest lawyers of great note who perished by violence was Jean des Mares, a humane and upright man, an accomplished jurist, an eloquent advocate. During his long life he was devoted to the crown, and was of the greatest service in managing public affairs. When he was seventy-one years of age, a mob having broken out in the city, he addressed the infuriated populace in favor of moderation and peace. It is not known how, in doing this, he gave offence to the king, but Charles VI. commanded him to be seized and tried for treason. He

was not permitted to speak in his own defence, and was hurried to the scaffold with a hundred other citizens of Paris, and there closed an honorable life with the calmness of a philosopher and the fortitude of a martyr. In other instances offended nobles made way with advocates whose tongues they could not otherwise silence, by assassination, sometimes private, sometimes judicial.

We have seen that in a very early period the bar had a jargon or dialect of its own; in losing this, other strange and formidable methods of speech came in vogue. Whether the example was at first set by the clergy who practiced in the courts, whether it was through their more general influence, or for whatever other reason it may have been, the oral pleadings of an advocate resembled a sermon more than anything else, and invariably began with some text of Scripture which he deemed suitable to his case, or pertinent to the remarks which he had to make. The formal partition of a discourse into regularly and extensively numerated divisions, which has been so often ridiculed, and which has become so odious to our modern ears, was regarded as an indispensable requisite of a forensic oration; and the greater the number of divisions, the greater apparently was deemed the discourse. One of the most urgent of the orders laid upon the bar was that they should make such divisions: "*Materiam causarum tuarum divide per membra, ut melius commendes memoriæ.*" Of all the recommendations to the bar, a satirical writer has said, this rule was only dominated by the first rule of all: "*Præferas solventes non solventibus;*" ("you shall prefer those who pay to those who pay not.") After citing and repeating his text of Scripture, so that the ruling idea of his discourse, the theme of all his variations, should not be lost sight of, the advocate proceeded to announce the divisions of his subject, and how these divisions were to be subdivided. What followed all this was a complete farrago of quotations from all authors, heathen and divine, thrown in apparently almost at random; the plaintiff was a Daniel, a Hyperion, or a Joseph, the defendant a Cleon, a satyr, or a son of Belial; artificial parallels between inci-

dents in the trial and some fable of mythology were long drawn out; the text of Scripture was repeated at the beginning of every paragraph; half of the speech would be in Latin and Greek, and hardly any part of it to the purpose.

Such was the taste of the age. Looking over these dreary intellectual secretions, which seem to us to be only persuasives to suicide, we may wonder how the judges could endure to listen to such impertinent medleys; and yet in only one recorded instance did a judge manifest any impatience at the received style, and we cannot be quite certain that he was impatient then. There was a case before the court arising out of a contract to manufacture or sell a certain number of jugs. The advocate began by citing a text of Scripture to the effect that the potter has power over the clay, and may make one vessel to honor and another to dishonor. Then after stating the divisions of his subject, he began with the manufacture of earthenware vessels among the Etruscans, and dwelt at great length upon the ceramic art among the Romans. Coming at last to a temporary pause, the president said: "Now, sir, that you have got the Romans in the jug, you can proceed with the case."

In those days a common-place book, filled with scraps of citations from all kinds of ancient writers, on all kinds of subjects, was deemed necessary to the equipment of every advocate. Pasquier, a truly great lawyer, and an exceedingly powerful orator, was among the first to discard the sacred text at the beginning of his speeches, and to renounce the continual quotation of the olden authors. Deeply imbued with classical learning, he perceived that the proper method of imitating the classic authors was not to patch up a composition out of their disjointed sayings; that the beauty of those authors consisted in their simplicity and perspicuity, a certain ease and directness of speech by which they concealed their art, instead of parading it to public view. The innovation which he made required all of his ability to sustain it. He had a neighbor who was also a lawyer, and was devoted to the old order of things; he claimed it as a glory that he had discovered the origin of the bar in the pages of Homer,

and he expressed it as his opinion that "there could be nothing more profitable than an etymological dictionary, containing the names of all the arts, and of all utensils, in Greek, Latin and French, which would be a fountain from whence one might draw the most beautiful similitudes and comparisons which could be used, and which would be nowise common." It was thus that he expected to adorn his eloquence, by unheard of words and phrases drawn from the dead languages, beautiful similitudes and comparisons extracted from a dictionary. Pasquier insisted with him that these citations were quite unknown to the ancients, and finally induced him for once to make a speech entirely out of his own head. Apparently he was not quite pleased with the experiment, for he afterwards told his adviser, "that that single speech had cost him more trouble than any three that he had ever pieced together by making quotations."

The habit seemed to be well-nigh incorrigible. It could hardly be expected that a discourse which was a mere medley, taken from various and indifferent sources, would have any very close relationship with the matter which happened to be under nominal discussion; if any connection existed, it was remote and precarious. Poggio, the Florentine historian, wrote a book on the question, "Whether, when a man is invited to dine with another, he should return his thanks to his host for the dinner, or whether the host should return thanks to his guest for the favor of his company." Doubtless it would occur to most persons that the solution of the question would depend almost wholly on the circumstances of each particular case; somewhat on the goodness of the dinner and the goodness of the company. But thus it was that scholasticism dealt with every question as a pure abstraction, leaving out all details as irrelevant matter.

It may seem wonderful to us that men could ever have made such orations, still more wonderful that men could ever have listened to them; but there is abundant evidence that they were greatly admired in their day; the absurdity of the method was neither seen nor suspected. Is the bar now unconsciously committed to practices which will be equally outworn in some coming time? If we could see them, possibly

such may chance to exist. A man through political influence, or popular favor, or executive patronage, gets on the bench; he is one whose opinion has been rarely asked, and still more rarely relied upon; and which, perhaps, could not be acted on in any serious matter without misgiving and trepidation; and yet as soon as he is placed on the bench, without any intellectual regeneration to convert ignorance into learning, or any mental alchemy to transmute his painful mediocrity into vast ability, he at once becomes an "authority." Could legal Lamaism go any farther? If the lawyers of whom we have been speaking quoted Christ and Ovid, St. Peter and Catullus in the same breath; do we not also cite Marshall and Busteed on the same page? If they culled their quotations with an unstinted hand, do we not cite authorities to prove every legal idea which we advance; often as to points which no one ever disputed, very much as if an astronomer in saying that the sun stands on the meridian at noon-day, should prove his position by adding the names of Newton, Herschel, and many other astronomers? It must be owned that we do something in this way; and it is all very proper; but it may happen that it will look quite otherwise to our descendants three or four hundred years hence.

In an age of great ignorance and corruption we could hardly expect to find the bench and bar quite free from reproach; if such were the case with the French bench and bar in early times, they were maligned to an almost unexampled degree. Satirists did not spare them. One of them thus addresses the bar: "When you are in the court, and are pleading one against the other, it would seem as if you were ready to devour each other, as if you had an eager desire to protect innocence; but when you come out, you go to the nearest drinking house, and there devour the substance of your clients. You are like foxes, which appear to be disposed to tear each other up, but which precipitate themselves in common upon a hen-roost, there to consume their prey." Another, no less savage, speaks of them as follows: "Is it a good thing to see the wife of an advocate, who had not ten crowns of rent after buying his office, going about dressed like a princess, with gold on her head, on her neck, on her

waist and other parts of her person? You say that this is suitable to your estate. To the devil with you, and your estate, too." But the most terrible apostrophe hurled at the judges, lawyers, and all others connected with the administration of justice, was as follows: "The gentlemen of the Parliament of Paris have the most beautiful rose which there is in France, (alluding to a rose-window which adorns the Palace of Justice), but it has been stained crimson with the blood of the crying and weeping poor. These gentlemen wear long robes, and their wives are dressed as princesses. If their garments were put under a press, the blood of the poor would run out. My lords jurists, are the revenues that you spend a part of your patrimony?"

This language is severe, and betrays a bitter animosity; but beyond the invective and denunciation, it contains hardly a serious charge. It was no discredit to the bar that the heat arising from discussion in the courts was not perpetuated in lasting dissensions; nor that some of the bar were prosperous and able to dress their families well; and as for the oppression of the poor, the accusation is so vague as to be of but little force.

However ardent may have been the feelings excited by the debates which took place in the courts, the courtesies of the bar seem to have been carefully maintained. In the trial of a cause, M. Claude Mangot, in making the closing argument, was interrupted by Versoris, whose speech he was answering. Turning to his adversary, he said: "Monsieur Versoris, you do wrong to interrupt me; you have said enough already to earn your oats!" After the judgment of the court had been rendered, the president said: "Monsieur Claude Mangot, the court directs me to say that that which is given to advocates for their services is not called oats, but honoraries." The reprimand was not very severe, but Claude Mangot took it so much to heart that he became ill from it and died a few days afterwards. He must any way have been of a singular disposition, for after his return from the University, beginning the study of the law, he made a vow not to utter a single word for four years, a resolution to which he firmly

adhered. During these four years he was exceedingly diligent in study, and in attendance upon the courts; and then, entering upon the duties of an advocate, he achieved a brilliant and lasting reputation. Of him it was said by another great lawyer: "He was the most accomplished person that one could desire to see. He was only thirty-six years old when he died, and he would have had no equal in probity and integrity, in learning, or in his acquaintance with literature, if he had lived to arrive at man's estate."

Another instance of collision between two members of the bar is recorded. In 1595, Arnauld, who was then at the head of his profession, was called on to pronounce the eulogy of Montmorency before the Parliament of Paris, on the occasion of the enregistering of the commission of the latter as Constable of France. This, as all like occasions, was a place for the display of great pomp, royalty and nobility being fully represented on the seats of the court-room; the orator for the time being expected to set forth all the virtues of the recently elevated dignitary with a Ciceronian discourse, abounding with the most fastidious encomium; the person thus applauded being present, and being presumed to take great pleasure in hearing his own praises, skilfully gotten up to order; such was the taste of the age. Arnauld acquitted himself the best he could, and was warmly applauded for his eloquence; but there happened to be present a young Huguenot advocate, Du Pleix, by name, who only saw the ridiculous side of this proceeding; and a few days afterwards he published an ingenious and laughable travesty of the oration, which met with still more favor than the original, whose fulsome adulation it was intended to rebuke. Arnauld had attained to great influence, fortune and fame, and having become a little dogmatic and sensitive, as old lawyers in such case sometimes are wont to be, he had Du Pleix brought before the court in secret session, to answer for this breach of propriety. On being reminded of his offence, Du Pleix, addressing the court, said, in a manly sort of way, "I have committed a folly, and it is necessary that I swallow it down. But open the doors, for it will be more exemplary for the youth,



if this should be recanted in their presence," and then in a public audience he prayed Arnauld to pardon him. But, like the flying Parthian, he reserved his most envenomed and fatal shaft for the last; for on scrutinizing the records of the Chamber of Accounts he found patents to the infant children of Arnauld for annual pensions of fifteen thousand pounds, which, by virtue of legal proceedings which he instituted he caused to be annulled.

It has been the fate of lawyers in all times to be abused by satirists who are keenly alive to the details of life, and to be praised by historians, who sum up general results. It must be admitted that in the time and place of which we are speaking, virtue was a plant of rare growth; from the throne to the hovel, corruption, passion, cupidity, prejudice, reigned almost supreme. The church was no better than the world. Spiritual preferment was bought and sold like any other commodity; boys were made bishops; and war, gallantry, and something worse, were the most prevalent pursuits of the clergy. It was an age when dogma trampled upon and scorned the better feelings of the heart. The ministers of religion, who usurped dominion of the fagot and the sword, were often the readiest apologists for crime. The most revolting and odious of all discourses ever placed upon record, was one made by Jean Petit, a monk and a doctor of theology, on the 8th day of March, 1408, before a royal council. The Duke of Burgundy, having caused the Duke of Orleans to be foully assassinated, appeared before the council, and his cause was pleaded by Jean Petit, who, in his address, not only absolved the assassin, but demanded that he should be recompensed, exalting the practice of assassination to the rank of one of the cardinal virtues. The right to assassinate an enemy he proved by twelve reasons, so numbered in honor of the twelve apostles; three being drawn from the moral philosophers, three from theological doctrines, three from the civil law, and three from the holy writ. These premises were set forth with a wealth of falsehood and blasphemy which has never been equaled; and yet the orator was so much admired that he was compelled to repeat his oration to an immense and applauding multitude in

front of the church of Notre Dame. There is, perhaps, not a nest of robbers now on the face of the earth that would tolerate the sentiments which he uttered. What, then, shall be said for the acclaiming populace?

Only one thing; and that is, that they were, perhaps, not quite so bad as they seemed, though, doubtless, they were close on the margin of total depravity. We cannot proceed far with the history and literature of that period, without perceiving that the people of that day were not the people of ours. What they admired, we admire no more; what they mourned over we rejoice at; their jests, which set the table in a roar, would make us shed tears, if we had tears to shed. So great is this difference that it seems to amount to more than a difference of taste. The truth is that scholasticism had totally vitiated the human mind; form had superseded substance; the object of language was neither to express nor conceal thought; not to convince the understanding, nor yet to persuade the heart; but was simply to astound and mystify the hearer by a maze of ingenious paradoxes, a train of audacious sophistries; and the speaker or the writer was admired only as an acrobat is admired, for his feats of skill, with but little regard to the utility of his efforts.

Where want of space forbids a resort to proof we must venture, as a well-grounded opinion, that in point of decorum, learning and integrity, the bar contained a greater number of creditable examples than any other rank or calling in society. Pierre Flotte, a lawyer, was excommunicated by the pope, Boniface VIII., as being "one-eyed of body, and totally blind of spirit;" (*Semi-videns corpore menteque totaliter excæcatus*); but this was only for maintaining the laws against the encroachments of the Holy See. Another lawyer, Yves de Kermartin, was canonized by another pope for the good deeds done while in the flesh. He is the only lawyer, it is said, who ever attained to that posthumous honor; he is known in the calender as St. Yves, and is the patron saint of the French bar. History transmits the names of many lawyers of this early period, who were no less beloved and respected for their integrity and virtue, than renowned for their learning and eloquence.

After the discovery, or reported discovery, of the Pandects at Amalfi, the study of the civil law was pursued with all the zeal which marked the restoration of learning; and then arose the great teachers of the law who mapped out the plan of ancient and modern legal science. Among these, and of the first was Alciat, a Milanese by birth, but by adoption a Frenchman, who first clothed the law with the elegance of polite literature, and who prepared the way for Cujas, the only lawyer to whose name the epithet of great has ever been permanently attached. Devoting his life exclusively to the study of the Roman law, possessing a vast genius for scholarship, Cujas is supposed to have attained a proficiency in this branch of learning which has never been equalled in modern times. His habit was to lie at full length on the floor, poring over some volume or manuscript of the law. Vast throngs of students followed him wherever he went. As he spoke of nothing but his favorite science, and never on the subject of religion, he was suspected of being a Calvinist. Being asked one day, directly, his opinion on the subject of religion, he remarked cautiously that he found nothing on the subject in the Pandects. There is no doubt but that this study of the civil law produced a class of men who, in respect of philosophic cultivation, of scientific attainment, and of liberality of character, excelled our revered sages of the common law. It was but natural that it should do so. We can not mention many names in this brief article; but let us pause, in conclusion, upon that of a good, pure and great lawyer, Chancellor l'Hopital.

There is something in the life of this man that elevates and refines our conception of human nature. It can not be unfair to compare him with a great English judge of a later period. Sir Matthew Hale was born more than a century after l'Hopital. Both were profound jurists; able, upright, laborious and conscientious judges. Both of them, in the intervals of exacting pursuits at the bar and on the bench, devoted their time to legal and miscellaneous writings. Of the latter kind, Hale left behind him two volumes of moral and religious tracts; l'Hopital two volumes of Latin poems.

The former had a great success in their day; the latter are said by those who have read them to be not destitute of poetical talent; but both the homilies and poems are nearly forgotten now. Both had a capacity for unrelenting and profitable study, and both were cultivated scholars. But at this point the resemblance ceases. The earliest born was by far the more enlightened of the two. Sir Matthew Hale, a prey to bigotry in its gloomiest form, caused two women to be burned for witchcraft; he was the last of the English judges who sentenced for that offence. So rank was his intolerance, that he declared that whoever believed not in witchcraft was an atheist. Far from being a time-serving judge, yet it so happened that all his errors only tended to his official promotion, and to an increase of popular favor. His didactic writings made his name, while he was living, a household word, and enhanced the veneration in which he was held after his death. If it is a reproach to his memory that he caused two decrepit, innocent old women, to be burned to death by fire, it was no discredit to him while living; he was mentioned in the prayers of the faithful, and his walk and conversation were pointed to as an example which the youth would do well to follow. Even now it is said that he must be judged by the age in which he lived, and that he is not to be censured for faults which were common to his time; but this claim is, perhaps, more charitable than correct, since we judge all men by their relationship with the era in which they live; not to applaud them if they have been no worse than those by whom they were surrounded, but to discern whether they have intellectually or morally excelled their age.

It is no merit now to disbelieve in witchcraft; it would have been a merit in Sir Matthew Hale. There were not wanting intelligent men and women, living at that time, who rejected the barbarous superstition; and certainly this learned judge, who was familiar with the great writings of antiquity, was not without the means of forming a higher judgment. The truth is, that with all his fine natural abilities and extensive acquirements, there was a certain narrowness in his composition which greatly limited the bounds of his intellectual

vision. To him the common law, with all its artificial, and often unjust and oppressive rules, was the perfection of human reason; and to him vulgar and irrational superstition spoke with the accents of the divine voice. While he was free from servility, he was at the same time a stranger to that spacious freedom of thought which made up the life of l'Hopital. Both lived in strangely troubled times, wherein the path of duty was closely beset with thorns and snares, when any sincere conviction might be branded and punished as a crime; but from out of these difficulties the French jurist achieved the nobler triumph. Sir Matthew Hale walked hand in hand with all the prejudices of his age; if he sometimes withstood the crown, he never resisted the people; l'Hopital did both. Animated by a sincere respect for religion, mindful of its precepts, and diligent in its observances, he discarded the common belief in sorcery. At a time when religious persecution was esteemed to be the first duty of a citizen, he pleaded almost alone for religious toleration. He was not only in advance of his age; he was in advance of the present age.

"Placed by circumstances near a king who was a minor, and between two hostile factions, charged with the maintenance of the royal authority against all the unchained passions and interests of the time, l'Hopital was a political as well as a forensic orator; but whether in the assemblies of the States General, or in the forum of the Parliament, he never forgot his character as a magistrate. It was not by violence but by gentleness that he sought to allay hatred and to restore peace. It was toleration that he preached, with a strong and natural eloquence, sprinkled with popular proverbs, breathing the amiable spirit of the gospel. Whilst Catholics and Huguenots were running to arms, he assailed his adversaries with the weapons of charity. 'A good life,' he said, 'persuades more than prayer; the sword can do but little against the spirit, unless it is to destroy the soul with the body. Let us take away these diabolical names, names of parties, factions and seditions, Lutherans, Huguenots, Papists; let us not change our name of Christians!'"

In another discourse he said: "Let us look upon the

Protestants as our brethern; let us not condemn a helpless people unheard. What we have to do is to rule the state, not to pass on questions of faith. One may be a good citizen without being a Catholic; one may separate from the church without ceasing to be a good subject of the king. What is needed is that the citizens, whether Protestant or Catholic, live in peace. Woe to those who counsel the king to put himself at the head of half of his subjects for the purpose of butchering the other half!"

And not in vain did he labor; for after years of painful and fearless effort, he obtained the edict which prevented the establishment of the Inquisition in France, and also the more short-lived edict of pacification, guaranteeing the free exercise of Protestant worship. Certainly a man living on the borderland of the middle ages—for he was born in 1504—capable of these liberal and generous views, devoting a life-time in endeavoring to secure their adoption, and achieving so much, may well be considered to be one of the brightest ornaments that the bar has ever produced in any country; as one of the heroes of the true knighthood of noble and magnanimous spirits, upon whose spotless lives the historian may dwell with pleasure, and the reader with profit.

If it is apparent to us that Chancellor l'Hopital was greatly in advance of the civilization of his time, his contemporaries for the most part only perceived that there was a want of harmony between him and them. With the usual discriminating logic of the world, they said that since he was in favor of toleration of Huguenots, he must needs be a Huguenot himself; a charge which was more plausible than any other that could be made, and was at the same time the most damaging. In 1568, Catherine de Medicis, the evil genius of her age, excluded him from the council; and a few days later she sent to his country seat, whither he had retired, and demanded the seals. He surrendered them without regret, saying truly that the world had become so corrupt that he could no longer influence its affairs. He had, previously, in a public discourse, held at a time when the frame-work of society was completely overturned by civil war, when an imprudent word often meant

death to the speaker, declared, with that unconscious intrepidity which was one of the most marked traits of his character, "Every order of society is corrupted; the people are badly instructed; they hear only of tithes and taxes, nothing of good morals; each wishes to see his own religion approved, that of all others persecuted."

It is said that in his retreat he found unexpected enjoyments. The exercise of private charity, the amusements of a country life, the reading and composition of Latin poems, in which he took great pleasure, and the conversation of a few friends, occupied the time which was not consecrated to the care and education of his children. Passing his days in this peaceful manner he wrote to a friend; "I was ignorant that rural life possessed so many charms. I have seen my hair grow white without knowing where I could find happiness. In vain nature had created me to love repose and leisure; I never should have surrendered myself to that pleasing inclination, if Heaven, regarding me with an eye of pity, had not released me from the fetters which I should not have been able to break. If any one imagines that I thought myself happy when fortune seemed to smile upon me, and that I am unhappy now that I have lost all her brilliant advantages, he knows but little of the bottom of my heart."

Four years after his retirement he saw in the massacre of St. Bartholomew, the dire catastrophe of that policy of violence which he had powerfully struggled against all his life. He recorded his sad commentary on the event in the lines of Statius:

"Excidat illa dies ævo, nec postera credant  
Saecula. ...." [*Lib. V.*]

But his own life was imperilled; furious bigots recalled the author of the theory of toleration which was a condemnation of their wicked deeds. Being counselled to flee for safety, he said, "By no means; I shall only go hence when, according to the pleasure of God, my hour is come." The next day he was told that a troop of armed men were approaching the house, and he was importuned to allow the doors to be closed and that his family and friends there present might

fire upon them if they endeavored to enter; but being perfectly unmoved, he replied, "No; open the door; and if the small door is not wide enough for them to enter, open the large one." The men had, indeed, come to put him to death, but just before they reached the house they were overtaken by a messenger from the king, who was sent to inform them that the chancellor was not of those who were proscribed. On being told this he said coldly and without changing countenance, "I did not know that I had merited either death or pardon."

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## II. *THE EXTRA-TERRITORIAL FORCE OF STATUTES.*

Statutes have no inherent extra-territorial force. National preservation requires that no sovereignty shall permit the intrusion of a foreign law upon its soil ; and the recognition of such laws rests solely in the convenience and mutual necessities of nations ; it is necessarily left with each state to say to what extent it will sanction and enforce the laws of other states. "Whatever force and obligation," says Mr. Justice Story, "the laws of one country have in another, depend solely upon the laws or municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent."\*

It is sometimes claimed, that, owing to the intimate relations existing between the states of this Union under the federal constitution, the obligation to enforce, within certain limits, the laws of sister states, must rest in something more binding than mere comity. But it is now conceded that the clause of the federal constitution, which provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state ; and that Congress may, by general laws, prescribe the manner by which such acts, records and proceedings shall be proved, and the effect thereof," does not give the laws of a state any extra-territorial force. As between themselves the states are sovereign ; and in each, subject only to the limitations of the federal constitution, is vested the sole and exclusive authority to enact and enforce laws within its territorial limits. In this respect the states of the Union are as foreign to each other as France and Great Britain. The exclusive right of one state, as against the other states, to make and enforce its own laws,

\* Sto. on Conf. Laws, § 23.

necessarily excludes the sovereign authority of any other state to extend its laws over the same jurisdiction.

Whatever the theory of inter-state comity may be, in actual practice the right of one state to bind another by its laws is repudiated, and only such force and effect is given to the laws of a sister state as is deemed expedient. In the *Bank of Augusta v. Earle*,\* the Supreme Court of the United States, while urging very strongly that a greater degree of comity and friendship should be presumed to exist between the states of the Union, than between strictly foreign nations, said that, "when the *interest* or *policy* of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end." A rule which rests wholly in local interest and policy will never be uniform in its operation in the different states. Comity as recognized in Maine, may be, and in some respects is, quite different from that adopted by the courts of Louisiana. In theory, the exercise of international comity is left to the political department of the government. It is a comity of nations and not of courts, says Mr. Justice Story; but practically it is a comity of courts; for "the exercise of comity," says Chancellor Kent, "in admitting or restraining the operation of a foreign law, rests, unavoidably, in sound judicial discretion, dictated by the circumstances in the case."† But, of course, when the law-making power prescribes a rule on this subject, the rule must be respected by the courts. In the absence of express legislation, the exercise of comity rests upon the presumption that the political power sanctions it, for in the absence of a particular rule the courts will presume that the legislature intended to adopt the generally received principles of comity.‡

And here arises a hopeless conflict of authority. It is necessarily left to the courts of each state to determine what are the generally received principles of comity, and how far they are applicable to its institutions, and in harmony with its policy and laws. The decision in each case must rest upon a vari-

\* 13 Peters, 519.

† 2 Kent. Com. 458; note; *Blanchard v. Russell*, 13 Mass. 6; *Commonwealth v. Aves*, 18 Pick. 193.

‡ *Thompson v. Waters*, 25 Mich. 214.

ety of circumstances and local considerations. Whenever a doubt arises as to whether the law of the forum or the foreign law should prevail, the courts will resolve the doubt in favor of the former.\* And in a conflict between their own and a foreign law, or where conflicting rights have been acquired under a foreign law, and that of the forum, the courts will enforce the *lex fori*.†

Comity, as recognized in England and the United States, sanctions the admission and operation of foreign laws relative to rights growing out of contract, express or implied, and to the succession of movable property, and, it seems, as to such torts as are held to be transitory. But, as will be shown hereafter, a right which is the mere creature of a local statute, will not be enforced outside the jurisdiction in which the statute was enacted. Statutes governing the manner and circumstances under which real property may be held, transmitted, bequeathed, or transferred; or regulating damages for injuries thereto, are wholly in-territorial.

The rule in relation to foreign contracts may be stated generally, as follows: The construction and validity of a contract are to be determined by the law of the place where it was made, or was to be performed; and being valid in such place, it will be held valid everywhere, and will be enforced in all courts, unless such contract is injurious to the interests, rights or convenience of the inhabitants of the state in which it is sought to be enforced, or contravenes the laws or policy of such state, or the laws of nature, or of God. Contracts in evasion or fraud of the laws of a country, or of the rights and duties of its subjects, as well as those against good morals, religion, public rights, the national policy or institutions, will not be enforced in any country affected by such considerations, although valid where made or to be performed. And, generally, if a contract is void by the laws of the place where it was made or was to be performed, it will be invalid every-

\* *Saul v. His Creditors*, 17 Mart. (La.) 595; *Mahorner v. Hove*, 9 S. & M. 247; *Fant v. Miller*, 17 Gratt. 47.

† *Sto. on Conf. Laws*, §§ 327, 414, 473b, 525; *Potter v. Brown*, 5 East. 421; *Harper v. Stanbrough*, 2 La. Ann. 377; 2 Kent. Com. 461; *Green v. Van Buskirk*, 5 Wall. 307.

where, and no court will aid in carrying it into execution.\*

Mr. Wharton, in his work on Conflict of Laws, gives the following rule for determining the territorial seat of obligations, as being that upon which the authorities can be best harmonized: "Obligations, in respect to the mode of their solemnization, are subject to the rule *locus regit actum*; in respect to their interpretation, to the *lex loci contractus*; in respect to the mode of performance, to the law of the place of performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and, in all cases not specified above, supplies the applicatory law."†

The rule of *locus regit actum* does not control as to the formalities requisite for acquisition and disposition of real property. Such contracts must conform to the *lex rei sita* as to the mode of execution or authentication;‡ and so where the *lex rei sita* of personal property made delivery a formal requisite to a valid sale, it was held that a sale of such property in another state, where delivery was not necessary to the validity of the contract, was void as to creditors in the former, because unaccompanied by delivery.§ An instrument which

\* Sto. Conf. Laws, §§ 244a, 245; *Blanchard v. Russell*, 13 Mass. 1; *Broadhead v. Noyes*, 9 Mo. 56; *Cole v. Lucas*, 2 La. Ann. 946; *Hughes v. Klingengender*, 14 Id. 845; *Hinds v. Bazealle*, 3 Miss. 837; *De Sobry v. De Laistre*, 2 Harr. & J. 193; *Thrasher v. Everhart*, 3 Gill & J. 234; *Smith v. Godfrey*, 8 Foster, 382; *Andrews v. Pond*, 13 Pet. 65; *Armstrong v. Toler*, 11 Wheat. 258; *Cambioso v. Maffit*, 2 Wash. C. C. 98; *Blake v. Williams*, 6 Pick. 286; *Cannan v. Bryce*, 3 Barn. & Ald. 179; *Kanaga v. Taylor*, 7 Oh. St. 134; *Crosby v. Houston*, 1 Texas, 203; *Territt v. Bartlett*, 21 Vt. 184; *Phinney v. Baldwin*, 16 Ill. 108; *Greenwood v. Curtis*, 6 Mass. 358; *Broughton v. Bradley*, 36 Ala. 689; *Maguire v. Pingree*, 30 Maine, 508; *Loan Co. v. Turner*, 13 Conn. 249; *Watson v. Brewster*, 1 Penn. St. 381; *Martin v. Martin*, 9 Miss. 176; *Jones v. Jones*, 18 Ala. 248; *Andrews v. Herriott*, 4 Cow. 508, note; *Brown v. Freeland*, 34 Miss. 181; *Anderson v. Doak*, 1 Ired. (S. C.) L. 295; *Allen v. Watson*, 2 Hill (S. C.) 319; *Warder v. Arall*, 2 Wash. (Va.) 282; *Forbes v. Scannell*, 13 Cal. 242.

† Wharton Conf. Laws, § 401 p.

‡ *Goddard v. Sawyer*, 9 Allen, 78; *Reaume v. Chambers*, 22 Mo. 36; 2 Pars. Cont. 571, note.

§ *Oliver v. Townes*, 14 Martin, 93; *Skiff v. Solace*, 23 Vt. 280.

cannot be enforced in the place of its inception for want of a stamp is not invalid elsewhere, unless it is absolutely void by the *lex loci*, and not even then when made to be performed in another state, or when it concerned immovable property in another state.\*

Ludlow v. Van Rensselaer, *supra*, was an action on a note made in France but payable in New York. It was admitted that an action could not have been maintained on the note in France, as it was not stamped as required by the laws of that country. It was held, that, as the court did not sit to enforce the revenue laws of France, it was immaterial whether the note was stamped according to the laws of France or not; but, said the court, "If it were otherwise, it might well be said that the parties never contemplated exacting the payment of this note in that country, and this would form a sufficient excuse here for not adhering rigidly to a matter extrinsic and formal, as to the contract, though it might be necessary in order to sustain an action in the courts of France."

And it seems that the rule of *locus regit actum* does not apply to contracts made in violation of the statute of frauds, when sought to be enforced in a place where such statutes are not in force.†

The case of Carrington v. Brents,‡ which seems to hold a contrary doctrine, is not authority, for several reasons. That case involved the validity of a parol contract made in Virginia for the sale of lands in Kentucky. The contract was sustained on the ground that it was made valid in Virginia by part performance, and because the Kentucky statute of frauds was passed after the contract was made. It is now the settled law that a contract concerning realty must be controlled

\* Sto. Conf. Laws, § 260; Fant v. Miller, 17 Gratt. 47; Ludlow v. Van Rensselaer, 1 Johns. 95; Ticknor v. Roberts, 11 La. Ann. 14; Bank of Rochester v. Gray, 2 Hill, 227; Vidal v. Thompson, 11 Mart. 23; James v. Catherwood, 3 Dow. & Ry. 190; Wynne v. Jackson, 2 Rus. 351; Holman v. Johnson, Cowper, 343.

† Sto. Conf. Laws, § 576a; Leroux v. Brown, 12 C. B. 801, 14 Eng. L. & Eq. 257; Bain v. Whitehaven, 3 House of Lords Cas. 1; Yates v. Thompson, 3 Cl. & Fin. 544; Downer v. Chesebrough, 36 Conn. 37.

‡ 1 McLean, 167.

by the *lex rei sitæ*, but if the contract was valid by the laws of the place where the land was situate, no subsequent enactment could make it invalid. The decision is right, but the reasons assigned are not sound.

The case of *Dacosta v. Davis*,\* seems to support the rule as stated by Mr. Wharton, but the decision is consistent with the rule in *Downer v. Chesebrough*, *supra*. This was an action on a contract made in New Jersey for the sale of personal property situate in and to be delivered in Philadelphia. *Held*, that the contract was subject to the operation of the New Jersey statute of frauds; on the ground that a contract entered into in one state concerning personal property situate in another, and to be there delivered, must be made in accordance with the law of the state where the contract was solemnized, and not according to the law of the place of performance. The result was unquestionably right, as the suit was instituted in New Jersey.

Nor, with all due respect to the great ability and learning of Mr. Wharton, does the second section of the above rule "best harmonize" with the authorities, nor would it promote the "most judicious result." The only just rule is that which requires the contract to be construed either according to the *lex loci contractus*, or by the *lex loci solutionis*, as will best carry out the intention of the parties, to be gathered from the instrument itself. And in the absence of any other guide, the law of that place will be adopted which will best sustain the contract. Parties may contract in the light of the law of the place where the contract is made, without any knowledge of the law of the place of performance, in which case the contract ought to be construed by the *lex loci*, for to do otherwise might have the effect of making a new contract for them, and one which they never intended to enter into; but on the other hand parties may rightfully contract with a view to the law of the place of performance, intending that their agreement shall be construed by the same law that governs its performance. There seems to be no good reason why such intention should not be recognized in the construction

\* 24 N. J. L. (4 Zab.). 319.

of the contract. Indeed, the whole doctrine of comity in regard to laws affecting contracts, is that it is presumed that the parties voluntarily made the law of a given place a part of their contract, and hence it enters into the agreement as a distinct and substantive stipulation or limitation, and ought to be enforced as such. Courts will not refuse to enforce a contract made and to be performed in another state, simply because such contract violates some local statute of the other state, unless upon some moral consideration such statute ought to be held operative on the contract. If the parties clearly intended to exclude the operation of the statute, it was not a part of their voluntary contract, and ought not to be enforced against it in a foreign jurisdiction, unless the obligation imposed by the statute is one involving a moral obligation, recognized as valid by the laws of the civilized world, regardless of local statutes.\*

The rule as generally stated by the authorities is that the interpretation, construction and rights of a party under a contract are to be determined by the laws in force at the time, in the place where the contract was made, unless the parties provided for its execution elsewhere; in which case it is to be governed by the laws of the latter place, unless the parties intended that it should be governed by the laws of the former.†

The rule that as to the mode of performance the law of the place of performance is to govern, must be taken with the qualification that it is competent for the contracting parties to refer the question to the laws of the place where the contract was made, and such a stipulation may be express or implied. It has been held that where a contract is to be performed

\* *Arnold v. Potter*, 22 Iowa, 194.

† *Herschfeld v. Dixel*, 12 Ga. 582; *Boyd v. Ellis*, 11 Iowa, 97; *Arnold v. Potter*, 22 Iowa, 197; *Goddin v. Shipley*, 7 B. Mon. 575; *Broadhead v. Noyes*, 9 Mo. 56; *Sherman v. Gassett*, 9 Ill. 521; *Fisher v. Otis*, 3 Chand. (Wis.) 83; *Gaylord v. Johnson*, 5 McLean, 448; *Pryor v. Wright*, 14 Ark. 189; *Peck v. Hibbard*, 26 Vt. 698; *Bank v. Colby*, 12 N. H. 520; *Bank v. Ruckman*, 16 Gratt. 126; *Hunt v. Standart*, 15 Ind. 33; *Lee v. Selleck*, 32 Barb. 522; *Thompson v. Ketcham*, 4 Johns. 285; *Dyke v. Erie Ry. Co.*, 45 N. Y. 113.

partly in one country, and partly in another, each portion should be construed according to the laws of the country where it is to be performed;\* and so where, by the terms of a contract for the purchase of land lying in another state, the purchase price is to be paid in the state where the contract was made, the *lex rei sitæ* will govern as to the title of the land, and the *lex loci contractus* as to the effect of a failure of consideration.†

But in *McDaniel v. The Railway Co.*,‡ it was held, that a contract for the transportation of cattle from a point in that state to Chicago, must be governed wholly by the laws of Iowa. The decision, however, was placed partly on the ground that the contract was entire. And in *Arnold v. Potter* § it was held that where a note is usurious by the law of the place where made, as well as by that of the place of payment, the law of the former place will govern as to the consequences of the usury.||

That the *lex fori* determines the remedy is conceded by all the authorities, but they are far from being harmonious as to the distinction between rights and remedies. Want of space forbids any general review of the authorities on this subject here, but a reference to a few of the decided cases will illustrate the difficulties that arise in determining questions arising under this rule.

By the laws of New York, the indorsement of a promissory note in blank constitutes an unqualified assignment of the note, and parol evidence is inadmissible to show that the indorsement was for collection merely, and that the indorser should not be held responsible; but in an action in Connecticut against an indorser of a note, made and indorsed in blank in New York, it was held that such evidence was admissible. The court said: "If this cause had been tried in New York, no doubt the defendant's plea would have been held insufficient upon the general demurrer, upon the ground that the

\* *Pomeroy v. Ainsworth*, 22 Barb. 118.

† *Glenn v. Thistle*, 23 Miss. 42. ‡ 24 Iowa, 412. § 22 Iowa, 194.

|| To the same effect see *Andrews v. Pond*, 13 Pet. 65; *Mix v. Mad. Ins. Co.*, 11 Ind. 117.



parol contract therein stated could not alter or vary the legal import of the blank indorsement." And yet the court held the plea to be a complete defence in Connecticut, on the ground that the law of New York did not relate to the substance of the contract, but only to the manner of proving it.\* While admitting the soundness of this decision, to say that it gives the same effect to the contract that would have been given it by the laws of New York, as administered by its courts, would perhaps be straining the point. The contract set up by the defendant was invalid and would not have been enforced in New York, where it was made, and was to be performed, because not solemnized as required by the laws of that state. Might not the decision be more properly placed on the ground, that, as the contract involved no moral turpitude, and was capable of being established in accordance with the rules of evidence prescribed by the *lex fori*, the formalities requisite to the solemnization of the contract under the laws of New York would not be given extra-territorial force to invalidate the voluntary agreement of the parties?

And the same may be said of those cases which hold that statutes of frauds have no extra-territorial force, on the ground that they pertain to the remedy solely. Such statutes are founded upon purely local policy, and are in-territorial because no state is under any obligation to enforce the local policy and regulations of another state. Mr. Wharton says such statutes are based on moral grounds,† and he inclines to the view which gives them extra-territorial force. But it would seem that these statutes are more in the nature of police regulations, made to prevent fraud and perjury, than declarations of general moral obligations. They are not enacted to prevent fraud and perjury in the making, but in the enforcing of the contract. Hence it would seem more proper that the law of the forum should govern; as the apprehended evil practices must be committed there if anywhere. One state has no authority to superintend the morals of the citizens of another state, nor is it under any obligation to pass laws to prevent the commission of crime there. Suppose a contract

\* *Downer v. Chesebrough*, 36 Conn. 39.

† *Conf. Laws*, § 690.

concerning the sale of personal property, made and to be performed in one state where there is no statute of frauds in force, is made the subject of an action in another state where the statute is in force; would the courts of the latter state refuse to enforce the law made to prevent the commission of crime within its borders, simply because the state where the contract was made had not seen fit to adopt such measures? And on the other hand, to reverse the case, would the courts of a state where no such regulation was in force, be more tender of the morals of the citizens of another state than of its own, in order to enforce foreign laws?

But it must be admitted that these regulations, while they relate to the remedy to the extent in which they are merely declaratory of the rules of evidence, go to the very life of the contract, where they are operative upon it. An obligation that is incapable of being enforced is no obligation at all. And the only ground upon which their extra-territorial operation can be rejected on any principle of comity, is that they are mere local regulations made to prevent offences against the law of the state enacting them, and hence to be adopted or not by each state as to it seems most convenient and proper. It is a matter of state policy in which the state of the forum is necessarily alone interested. A very shadowy distinction is sometimes recognized by the courts in construing statutes of limitations. When such statutes merely bar an action, they are universally held to pertain to the remedy only, and to be in-territorial; but when such statutes bar or discharge the obligation itself, they are generally held a bar everywhere. This distinction is purely technical and is not very rigidly adhered to; and, there being no fixed rule by which to determine whether a given statute belongs to one class or the other, the decisions are not always harmonious.

In *Baker v. Stonebraker*,\* it was held that a statute of Maryland, which provided that no bill, bond, judgment, etc., of above twelve years standing should be "*good and pleadable, or admitted in evidence*, saving," etc., afforded a complete bar to an action brought in Missouri after it would have been

\* 36 Mo. 338, 349.

barred in Maryland.\* This decision was based on the ground that the statute barred the right rather than the remedy. But in the case of *Fant v. Miller*,† a majority of the court held that a statute of Maryland, declaring, among other things, that an unstamped note should not be "*valid or available for any purpose whatever*," related to the remedy solely, and did not render the contract void.

Another distinction generally recognized is that a title to property, real or personal, once fixed by a statute of limitation is as good and valid as a title acquired in any other manner, and will be recognized wherever the property may be afterwards taken.‡

The enforcement of the contracts of married women, made in a foreign state, and valid by its laws, but invalid by the laws of the forum, gives rise to many perplexing questions. It is generally true that a contract valid where made is valid everywhere. But how can a foreign contract creating a personal liability against a married woman be enforced in a state where such liability is not recognized, and consequently no machinery provided for the enforcement of such an obligation? In such a case the *lex fori* must prevail.§ Comity does not require the courts of one country to enforce any other or different remedies for the citizens of another country than are provided for its own.||

Statutes regulating personal capacity give rise to a more hopeless conflict of authority than those of any other class. In general, statutes recognizing and regulating natural disabilities and incapacities, will, in a proper case, be enforced

\* And see *Carroll v. Waring*, 3 Gill & J. 491.

† 17 Gratt. 47.

‡ *Shelby v. Guy*, 11 Wheat. 361; *Newby v. Blakey*, 3 Hen. & Munf. 57; *Townsend v. Jemison*, 9 How. 407; *Cargile v. Harrison*, 9 B. Mon. 518; *Alexander v. Torrence*, 6 Jones Law, (N. C.) 260; *Fears v. Sykes*, 35 Miss. 633; *Brown v. Brown*, 5 Ala. 508.

§ *Bank of Louisiana v. Williams*, 46 Miss. 618.

|| *Broadhead v. Noyes*, 9 Mo. 56; *Dakin v. Pomeroy*, 9 Gill, 1; *Coffin v. Coffin*, 16 Pick. 323; *LeRoy v. Crowninshield*, 2 Mason, 157; *Ruckmaboge v. Mottecund*, 32 Eng. L. & Eq. 84; *Flowers v. Foreman*, 23 How. 132; *Williams v. Jones*, 13 East. 439; *Walworth v. Routh*, 14 La Ann. 205; *Putnam v. Dike*, 13 Gray, 535; *Campbell v. Stiner*, 6 Dow 116; *Bank of Gallipolis v. Trimble*, 6 B. Mon. 599.

extra-territorially; those creating artificial disabilities are wholly in-territorial, except, perhaps, as to contracts made or acts done within their jurisdiction. The civilians generally hold that the law of the domicil determines personal capacity, and that, having once attached to the person, such laws follow him, and are obligatory everywhere, until he acquires a new domicil; but such has never been the law in this country, nor in England. With perhaps some exceptions, the *lex loci contractus aut actus*, governs capacity as to contracts relating to movables, and the *lex rei sitæ* as to immovables.\*

It was laid down in *Saul v. His Creditors*,† that, although the law of the place of the contract would generally govern as to capacity, yet where one who is a *major* by the law of his domicil, comes temporarily into a state by whose laws he would, if domiciled there, be a *minor*, his capacity is to be sustained, on the ground that where there is a conflict of jurisdictions as to capacity, that law will be enforced which most favors capacity. Judge Story rejects this qualification of the rule,‡ and so does Mr. Parsons,§ while Mr. Wharton gives it his most unqualified indorsement.|| Want of space forbids a more extended examination of this interesting branch of the subject under consideration. The question has received a very elaborate consideration at the hands of Mr. Justice Story in his work on Conflict of Laws, and Mr. Wharton has also discussed it in his later work on the same subject, with his usual research and discrimination.

Statutes regulating the succession of real property will be enforced only as to realty within the jurisdiction. And a devise of immovable property must be made in conformity to the *lex rei sitæ*, and that law also governs as to capacity, the power of disposal and the forms and solemnities necessary to transfer or transmit title.¶ But in the construction of techni-

\* *Sto. Conf. Laws*, § 102; *Polydore v. Prince*, 1 Ware, 413; *Bank of Louisiana v. Williams*, 46 Miss. 618; *Pickering v. Fisk*, 6 Vt. 102; 2 Pars. Cont. 573; *Male v. Roberts*, 3 Esp. 163; *Thompson v. Ketcham*, 8 Johns. 189; *Succession of Jesse Wilder*, 22 La. Ann. 219.

† 17 Mart. 596. ‡ *Conf. Laws*, § 76. § 2 Pars. Cont. 573.

|| *Conf. Laws*, §§ 114, 116; and see *Hellman, In Re.*, L. R. 2 Eq. 363.

¶ *Coffin v. Coffin*, 2 P. Wms. 291; *Curtis v. Hutton*, 14 Ves. 537; *U. S. v. Crosby*, 7 Cranch, 115; *Holmes v. Remsen*, 4 Johns. Ch. 460.

cal terms of a will the law of the domicil is to be applied, unless the context furnishes some other clear guide.\* The succession to personal property is governed exclusively by the law of the actual domicil of the intestate or testator.† And, as bearing on this question, a marriage valid where solemnized is valid everywhere, unless repugnant to the general obligations of morality and Christianity. A marriage contracted in fraud of the laws of a state by citizens domiciled there is not invalid for that reason, if valid where solemnized.‡ And on the other hand, a marriage incestuous and void where solemnized is not necessarily invalid elsewhere, unless between kindred too near to marry by the laws of the civilized world.§ And a child legitimate by the law of the place of its birth is legitimate everywhere, and for all purposes, in the absence of local statutes to the contrary.|| In England under the law of descents, it is held that one born illegitimate is not legitimized by a subsequent marriage of his parents in Scotland, by the laws of which place the child would, in such case, be rendered legitimate. The English courts take the anomalous position, in such cases, that the child is legitimate as to property in Scotland, but illegitimate as to real property in England.¶

Guardians, executors, administrators, and assignees appointed under state insolvent laws, have no authority beyond the limits of the state in which they were appointed. Their powers, duties and liabilities depend on local statutes which have no extra-territorial force.\*\*

\* Sto. Conf. Laws, § 483.

† Nat v. Coons, 10 Mo. 543; Manuel v. Manuel, 13 Oh. St., 458; Moultrie v. Hunt, 23 N. Y. 394; Sto. Conf. Laws, §§ 473, 481.

‡ Medway v. Needham, 16 Mass. 157.

§ 2 Pars. Cont. 595; Wharton Conf. Laws, § 141; Sutton v. Warren, 10 Metc. 451; Warrender v. Warrender, 9 Bligh, 112.

|| Sto. Conf. Laws, § 93w. ¶ Birthwhistle v. Vardill, 7 Cl. & Fin. 895.

\*\*Mason v. Nutt, 19 La. Ann. 41; McCarthy v. Hall, 13 Mo. 480; Vaughn v. Barret, 5 Vt. 333; Dorsey v. Dorsey, 5 J. J. Marshall, 280; Smith v. Guild, 34 Me. 443; Gilman v. Gilman, 54 Me. 453; Naylor v. Moffatt, 29 Mo. 126; Harper v. Butler, 2 Peters, 239; Goodwin v. Jones, 3 Mass. 514; Succession of Stephens, 19 La. Ann. 499; Probate

A right founded solely on a local statute can not be enforced extra-territorially, and it was said that a foreign law would be recognized "when it embraces and effectuates general principles, known and accepted by the jurisprudence of enlightened nations."\* And it was said in *Hughes v. Klingender*,† that, "comity of nations extends only to enforce obligations, contracts, and rights, under the provisions of laws of other countries which are analogous or similar to those of the state where the litigation arises." And in *Pickering v. Fisk*,‡ the Supreme Court of Vermont refused to entertain jurisdiction of a suit on a sheriff's bond given in another state, saying: "A court can sustain a suit on a foreign contract only when it can be enforced agreeably to the common law." In *Richardson v. The Railroad*,§ it was held that a succession in the right of action not existing by the common law can not be prescribed by the laws of one state to the tribunals of another.||

Penal statutes have no extra-territorial force, and their operation will not be sanctioned outside the limits of the state where enacted.¶

Statutes giving a right of action to the personal representatives or next of kin of persons killed by the wrongful act or default of third persons are penal in their nature, in that they generally give a right of action where none existed before. The action which accrued to the deceased, died with him and

*Court v. Hibbard*, 44 Vt. 597; *Leonard v. Putnam*, 51 N. H. 247; *Boilley's Estate*, 1 Tuck. (N. Y. Surr.) 422; *Succession of Young*, 21 La. Ann. 394; *Fisk v. Brackett*, 32 Vt. 798; *Murrell v. Jones*, 40 Miss. 565; *Insurance Company v. Needles*, 52 Mo. 17; *Booth v. Clark*, 17 How. 322; 1 Greenl. Ev., § 544; *Sto. Conf. Laws*, §§ 499, 504, 594; *Craft v. Wickey*, 4 Gill. & J. 332.

\* *Derrickson v. Smith*, 27 N. J. L. (3 Dutch.) 166; *Richardson v. The N. Y. Cent. R. R. Co.*, 98 Mass. 85; *Pickering v. Fisk*, 6 Vt. 102; *Hughes v. Klingender*, 14 La. Ann. 857; *Dike v. Erie Railway*, 45 N. Y. 118; *Fant v. Miller*, 17 Gratt. 47, per *Rives, J.*

† *Supra.*

‡ *Supra.*

§ *Supra.*

¶ And see *Woodard v. Rail. Co.*, 10 Oh. St. 121.

§ *Sedgwick on Stat. and Const. Law*, 2 ed. 64; *Flannegan v. Packard*, 41 Vt. 561; *First National Bank of Plymouth v. Price*, 33 Md. 487; *Folliott v. Ogden*, 1 H. Bl. 123; *Scoville v. Canfield*, 14 Johns. 338.

a new action is given on wholly new principles.\* Such actions, it seems, are strictly local.† A contrary doctrine prevails, however, in Georgia, where it has been held that an action of this character can be maintained in the courts of that state for injuries resulting in the death of a person, sustained in another state, provided the laws of such other state give a right of action; and it is further held very properly that the action must be based upon the foreign law, and must be brought by the person to whom such foreign law gives the right of action.‡ In statutory actions the remedy provided is exclusive, where the right did not exist at common law.§ The remedy being local a foreign court can not enforce it. It has sometimes been attempted to apply the law of the forum to such cases where the injured party died within its jurisdiction, but never with success.|| And so in *Woodard v. Rail. Co.*,¶ it was held that if the action could be maintained, the limitations in the local law must be enforced by the foreign court, and as such limitations would pertain to the remedy, a foreign court could not, on any recognized rule of procedure, carry them into effect.\*\* And besides, as these actions are purely statutory, not being founded on any right recognized by the common law of nations, nor upon any contract between the parties, to permit them to be maintained in

\* *Sherlock v. Alling*, 44 Ind. 184; *Blair v. Midland Railway Co.*, 10 Eng. L. & Eq. 437; *Richardson v. N. Y. Cent. R. R. Co.*, 98 Mass. 85; *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Cleveland, &c., R. Co. v. Rowan*, 66 Penn. St. 393; *Rail. Co. v. Zehe*, 33 Penn. St. 329; *Chicago, etc., Co. v. Whitton*, 13 Wall. 270.

† *Richardson v. N. Y. Cent. R. Co.*, *supra*; *Wharton on Conf. Laws*, § 479; *Woodard v. Rail. Co.*, *supra*.

‡ *Western & Atlantic R. R. Co. v. Strong*, 1 Central Law Journal, 485; *Rail. Co. v. Lacy*, 43 Ga. 461.

§ *Cole v. City of Muscatine*, 14 Iowa, 296; *Erickson v. Nesmith*, 15 Gray, 221; *Id.* 4 Allen, 233; *Id.* 46 N. H. 371; *Sto. Conf. Laws*, § 625a.

|| *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Beach v. Bay State Steamboat Co.*, 30 Barb. 433; *Crowley v. Panama R. R. Co.*, *Id.* 99; *Yeston v. Wisewall*, 16 How. Pr. 8; *Safford v. Drew*, 3 Duer, 638.

¶ *Supra*.

\*\* *Bank of Gallipolis v. Trimble*, 6 B. Mon. 599; *Pickering v. Fisk*, 6 Vt. 102.

a foreign jurisdiction would be to admit the foreign statute, *ex proprio vigore*, within the limits of such jurisdiction.

The better rule seems to be, that only such trespasses and offences against persons and property as are a violation of absolute rights, recognized and protected by the common law, and which exist irrespective of any statute, are transitory, giving a right of action wherever the person of the offender may be found. But this rule must be taken with the qualification that an act lawful where done will be held lawful everywhere. "In general," says Mr. Justice Story, "where actions *ex delicto* are held transitory and suits allowed to be maintained in a foreign forum, the right of action, and the nature and extent of the damage must be estimated according to the laws of the place where the wrong was committed."\* In support of this doctrine he cites *Seymour v. Scott*,† which would seem to be authority for a contrary doctrine, as it was there held that the defendant was liable for an assault and battery in a foreign state, although by the laws of such foreign country no damages were recoverable. And *in re The Halley*, Lord Chief Justice Selwyn said an English court would not enforce a foreign municipal law, and give a remedy in the shape of damages in respect to an act for which the English law imposes no liability on the person from whom the damage was claimed.‡

Words actionable at common law, spoken in another state will support an action; but otherwise, if not actionable at common law nor shown to be so by statute in the state where spoken, though actionable by the law of the forum.§ And it seems that an action will lie for words spoken in one state charging the commission of a crime in another.|| But it is doubtful if it would be so held as to words charging a strictly statutory crime in a foreign country. While under the constitution and laws of the United States, the several states are

\* Conf. Laws, § 307d.

† 1 H. & C. 219; 9 Jur. N. S. 522.

‡ 5 Moore P. C. Cas. N. S. 282.

§ *Stout v. Wood*, 1 Blackf. 71; *Wall v. Hoskins*, 5 Ired. 177; *Shipp v. McGraw*, 3 Murph. 463.

|| *Poe v. Grever*, 3 Sneed, 664; *Johnson v. Dicken*, 25 Mo. 580; *Cefret v. Burch*, 1 Blackf. 400.



bound to recognize the criminal laws of other states to a certain extent, no such obligation exists as to foreign nations. It was held in *Kirshner v. The State*,\* that where it is sought to incapacitate a witness by introducing the record of his conviction of an infamous crime in a foreign country, the record was admissible, but that the question as to whether the infamy was such as to incapacitate him was a question for the court. Judge Story says, "Even the conviction of a crime in a foreign country, which makes the party infamous there, and incapable of being a witness in their own courts, has been held not to produce a like effect here."†

The courts of one country will not recognize the revenue laws of another country or state.‡

Statutory liabilities of stockholders in foreign corporations will not be enforced.§

A set-off will be allowed or disallowed according to the law of the forum. Such laws are regarded as a part of the remedy.||

Exemption laws and state insolvent laws which merely exempt the person or property from seizure, have no extra-territorial operation.¶ An involuntary assignment of a debtor's effects under a state or foreign insolvent law will not vest title

\* 9 Wis. 140.

† Conf. Laws, § 92; *Commonwealth v. Green*, 17 Mass. 540.

‡ *Fant v. Miller*, 17 Gratt. 47; *Briggs v. Lawrence*, 3 T. R. 450; *Ludlow v. Van Rensselaer*, 1 Johns. 94; *Pickering v. Fisk*, 6 Vt. 102; *Cambioso v. Maffit*, 2 Wash. C. C. 98; *James v. Catherwood*, 3 Dow. & Ry. 190; *Wynne v. Jackson*, 2 Rus. 351; *Lambert v. Jones*, 2 Pat. & Heath, 144.

§ *Derrickson v. Smith*, 27 N. J. L. (3 Dutch.) 166; *Halsey v. McLean*, 12 Allen, 438; *Bank v. Price*, 33 Md. 487; *Erickson v. Nesmith*, 4 Allen, 233; *Id.* 46 N. H. 371.

|| Sto. Conf. Laws, § 575, 581; *Bank v. Trimble*, 6 B. Mon. 601; *Gibbs v. Howard*, 2 N. H. 296; *Ruggles v. Keeler*, 3 Johns. 263; *Davis v. Morton*, 5 Bush, 161; *Kelley v. Smith*, 1 Metc. 317; *Baldwin v. Hale*, 1 Wallace, 223.

¶ *Bronson v. Kenzie*, 1 How. 315; *Coffin v. Coffin*, 16 Pick. 323; *Atwater v. Townsend*, 4 Conn. 47; *Newell v. Hayden*, 8 Iowa, 140; *Toomer v. Dickerson*, 37 Ga. 440; *Holman v. Collins*, 1 Ind. 24; *Haskell v. Andros*, 4 Vt. 609; *Wood v. Malin*, 5 Halst. 208.

in the foreign assignee, and especially as against local creditors. Within certain limitations a voluntary conveyance is valid everywhere, but an involuntary conveyance is strictly local in its operation.\* It is the settled law in the United States that a foreign assignment, whether voluntary or involuntary, will not be permitted to operate as a transfer of property, whether movable or immovable, as against domestic attaching creditors.†

The authorities on the subject of foreign usury laws are in inextricable confusion and conflict. Such laws are not rejected or sanctioned upon any consistent theories or principles. There is no general rule that can be applied in such cases, except that courts will not enforce such laws extra-territorially if it can be possibly avoided, and it generally can. Usury laws are strictly penal in their character. It does not matter whether such laws provide for a forfeiture of all interest, a part of the interest, something in addition to the interest, or a part or all the debt, it is still a forfeiture and a partial or entire nullification of the voluntary contract of the parties. Hence, on principle, such laws ought to have no extra-territorial force. But if such laws are founded on moral considerations, as is sometimes held;‡ if the usurious contract is itself corrupt and against public policy, then the *lex fori* ought to control. Comity does not require one state to enforce a foreign contract injurious to the morals of its citizens, or against good morals or public policy generally. If any part of a contract is against the law or settled policy of the forum, no part of such contract will be enforced there, although a part of the contract be otherwise unobjectionable.§

\* Sto. Conf. Laws, §§ 411, 571b; Moreton v. Milne, 6 Binn. 353; Boston v. Boston, 51 Me. 585; Felch v. Bugbee, 48 Me. 9; Marsh v. Elsworth, 37 Ala. 85; Worden v. Nourse, 36 Vt. 756; Upton v. Hubbard, 28 Conn. 274; Culver v. Benedict, 13 Gray, 7; Oakey v. Bennett, 11 How. 33.

† Green v. Van Buskirk, 5 Wall. 307; 7 Wall. 139; Oliver v. Townes, 14 Mart. 93; Hutcheson v. Perrine, 1 C. E. Green, 167; Kidder v. Tufts, 48 N. H. 125; Stricker v. Tinkham, 35 Ga. 176; Blake v. Williams, 6 Pick. 286; Rogers v. Allen, 3 Oh. 468; Vey v. McHenry, 29 Me. 208; Sto. Conf. Laws, § 410.

‡ Bank v. Owen, 2 Peters, 527; Tiffany v. Savings Inst., 18 Wall. 375.

§ Hope v. Hope, 8 De G., M. & G., 731.

The Supreme Court of Missouri holds that a usurious contract made in this state is not immoral, although prohibited by law; that is, that there is no moral turpitude in the agreement to give or receive usury.\* And it would seem that if not inherently immoral here, our courts ought not to declare such a contract made in another state immoral, simply because the courts, or legislature of such foreign state are of a different opinion. It is not required that the courts of one state should be more regardful of the morals of the citizens of other states than they are of their own, and they have nothing to do with the local policy of another state.

It might be claimed that in an action on a contract made in Missouri and not immoral there, it ought not to be held immoral when sought to be enforced in another state where the other view prevails. It is enough to say that while an act legally innocent by the *lex loci actus* can not elsewhere be made criminal, yet it is a matter of opinion as to whether such act is against the policy of the state where it is attempted to enforce it, or as to whether it involves a violation of the moral law, as recognized by civilized nations. Polygamy is legal in some states, but the courts of a state not recognizing such marriages, would hardly enforce an obligation growing out of or founded upon a marriage of that character.

Courts will not take judicial notice of foreign laws. When relied on they must be pleaded and proven as facts.† The jury must determine from the evidence what the foreign law is, but its construction and application are for the court.‡

The decisions of courts of sister states in construing a

\* *Bank v. Harrison*, 57 Mo. 503.

† *Knapp v. Able*, 10 Allen, 485; *Kline v. Baker*, 99 Mass. 254; *Pickard v. Bailey*, 6 Foster, (N. H.) 152; *Bean v. Briggs*, 4 Iowa, 466; *Cook v. Crawford*, 1 Texas, 9; *Peacock v. Banks*, 1 Ala. 387; *Miller v. Avery*, 2 Barb. Ch. 582; *Porter v. Wells*, 6 Kas. 454; *Carey v. Rail Co.*, 5 Iowa, 357; *Hempstead v. Reed*, 6 Conn. 486; *Throop v. Hatch*, 3 Abb. Pr. 23; *Thompson v. Ketcham*, 8 Johns. 189; *Male v. Roberts*, 3 Esp. 163.

‡ *Dyer v. Smith*, 12 Conn. 384; *Ingraham v. Hart*, 11 Oh. 255; *Holman v. King*, 7 Metc. 384; *Rail. Co. v. Glenn*, 28 Md. 287; *People v. Lambert*, 5 Mich. 347; *Owen v. Boyle*, 15 Me. 147; *Ennis v. Smith*, 14 How. 400.

local statute are binding when such statute is brought in question in another state ; but such decision must be averred and proved as any other fact, otherwise it will have only persuasive force.\* But it has been held that the printed reports of adjudged cases are not evidence of the law of another state. The written law of a foreign state must be proved by the law itself as written, and the common or customary law, or unwritten law, by witnesses skilled in the law.†

Where the common law is known to be in force it will be presumed to be construed as in the forum.‡ And the Supreme Court of Iowa holds that such presumption is conclusive.§ But if the existence of an unwritten law is a fact to be found by the jury from the evidence of experts in that law, it is difficult to see how there can be any conclusive presumption as to what such fact is.

It would seem that where it is alleged and attempted to be proven that the courts of a state place a particular construction on a statute, the question of construction to that extent is one for the jury.|| The construction of unwritten foreign law is for the jury, but the construction of a statute of another state is for the court.¶

It is sometimes said that in order to sustain a foreign contract the courts of one state will, in the absence of proof to the contrary, presume that the foreign law is like their own.\*\* It would be more proper to say, that in an action on a contract made in another state, it will be presumed, in the absence of proof to the contrary, that the contract is conformable to the laws of such other state, provided it violates no well recognized moral obligation.††

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\* Donaldson v. Hewitt, 33 Ala. 534; Hoyt v. Thompson, 3 Sandf. 416; Johnston v. Bank, 3 Strobb. Eq. 263.

† Gardner v. Lewis, 7 Gill, 377. ‡ Houghtaling v. Bell, 19 Mo. 84.

§ Franklin v. Twogood, 25 Iowa, 520.

|| See Holman v. King, 7 Metc. 384.

¶ Moore v. Gwynn, 5 Ired. 187.

\*\* Rape v. Heaton, 9 Wis. 328; and see 2 Central Law Journal, 379, note.

†† Martin v. Martin, 1 S. & M. 176; Thompson v. Ketcham, 8 Johns. 189; Crozier v. Bryant, 4 Bibb, 174.

### III. NOTES OF CURRENT GERMAN LAW.

Under the above title we propose in each number of this REVIEW to notice briefly the most interesting decisions of the highest German courts, and opinions of German jurists, as represented in their legal reviews and other periodicals; including under the term German, not only those published within the limits of the German Empire, but those of Austria, German Switzerland, and such other neighboring countries as in their system of jurisprudence are substantially at one with it. The object is not to convert this into a "civilian" journal, nor even to discuss points of "civil" or continental law as such; but to make accessible to such American lawyers as love the study of their science, some fragments of the jurisprudence of the great race whose law is most nearly allied to our own. The topics selected will be so far as possible those common to both systems of law, and which admit of presentation in the familiar terms of our own legal language. The experiment is a novel one, and we enter upon it with sincere diffidence. Trial alone can determine whether, in the present hands, it can be made of any value, or of any interest to the readers of the REVIEW. But we are encouraged to make the attempt from a deep conviction that it is rather to humble essays of this kind than to elaborate and systematic treatises, that we must look for present contributions to the science of comparative jurisprudence—a science so often spoken of in these days, but which, as yet, can hardly be said to have any real existence, unless it be with so many other legal entities *in nubibus* or *in gremio legis*.

Striking proofs of the tendency of all modern legislation to harmony of views and identity even of positive rules, are to be found in the new laws of the German Empire respecting personal status and the marriage relation,\* which will take

\* Gesetz über die Beurkundung des Personenstandes und die Eheschliessung. Vom 6. Februar, 1865. Reichsgesetzblatt, s. 23 ff.

effect on the first of January, 1876. They not only transfer the whole system of registration of births, marriages and deaths to the civil authorities, and make marriage dependent for its validity merely upon the civil contract, as with us, and do away with many of the old canonical impediments, but they follow the example of most of our recent divorce laws in abolishing the "divorce from bed and board." This anomalous and really immoral institution, sustained through so many centuries by ecclesiastical prejudices, grounded in the sacramental theory of marriage, disappears from Germany while it is still retained by some states of our own Union. Wherever the divorce *a mensa et thoro* has heretofore been granted, there shall hereafter be a full divorce *a vinculo*.

Another law taking effect at the same time\* changes the age of majority from that heretofore observed in all civil law countries, to the one so familiar to us in England and America, twenty-one years. And, as if to mark more distinctly the coincidence with our own legislation, the marriage-law above referred to introduces a new period of "majority for marriage purposes," viz: the age of twenty for males and of sixteen for females.

But even changes of positive legislation, perhaps, do not promise so much for the profitable comparison of various systems, and for the science of comparative jurisprudence, which may be hoped for, one day, as its result, as do the present tendencies on all sides to treat the material law in a common scientific method. While our common lawyers are making some little effort at a more systematic and orderly classification of their great stores of adjudged cases, the Germans, on the other hand, have made a marked advance toward the recognition of such cases as the true foundation of a scientific jurisprudence. It is, indeed, a mere vulgar error on the part of some of our own writers, to suppose that the doctrine of "precedent" is peculiar to English law, and that the civilians ignore previous decisions entirely. The great collections of such decisions in every century, from that of

\* Gesetz betreffend das Alter der Grossjährigkeit. Vom 17. Februar, 1875. Reichsgesetzblatt, s. 71.

the glossators down, is enough to refute this delusion. Still it is true, that until very recently their use on the continent has been chiefly confined to practical lawyers, and that the jurists who have taught law and written upon it rarely condescended to quote a decision. The recent change in this respect will be evident to any one who will compare such a work as the "Pandekten" of Windscheid, (the present distinguished successor of Vangerow at Heidelberg) with similar works by even so recent jurists as Puchta, Savigny, etc. In the German legal periodicals it is not uncommon now to see discussions of legal doctrine fully illustrated by references to the "Archives" and other collections of recent decisions; and most of these periodicals devote a considerable part of their space to such "Reports," or "Digests," as they may not improperly be called. Many of them are exceedingly well done, and American reporters and writers of opinions could learn useful lessons of brevity, directness and point from them. They seem to have gained in these respects within a century as much as English and American Reports have lost within the same time. It is interesting to compare such a series for instance as *Seuffert's*\* with the *Meditationes ad Pandectas* of Leyser, which answered the purpose of reports in the 18th century. But we must not digress for this purpose now. Many of the decisions recorded in Seuffert are directly in point upon the questions most discussed in our courts; and while we have no desire to add to the already extravagant number of "authorities" heaped up in the briefs of ambitious young lawyers, anxious to show their learning, or industrious in copying foot notes—yet we venture to think that private study could often be much worse employed than in comparing these decisions with our own, and in weighing the apparent or real discrepancies in the various *rationes decidendi*.

At all events, where such a doctrine as that of "mistake of law" has been adopted bodily from the civil law, and has

\* J. A. Seuffert's Archiv für Entscheidungen der obersten Gerichte in den Deutschen Staaten. XXXer Band, 1es. und 2es. Heft, herausgegeben von A. F. W. Preusser. München, 1875.

led to so much confusion in the attempt to adapt it to its new surroundings, there can be no objection to seeking its rational explanation in the jurisprudence from which it was originally borrowed. A case in the last number of Seuffert's Archiv\* seems to us well worth notice in its bearing on this much mooted question. It holds that the essential question in all cases of mistake is whether the mistake is excusable or not; and that the common rule by which mistakes of fact are to be excused, and mistakes of law not, must be interpreted with reference to this. It is not to be presumed that every man can know all the circumstances of fact by which he is surrounded, and therefore when he asks relief against a mistake of fact he receives it, if the mistake was not due to his own negligence. But in regard to mistakes of law the presumption is different, since every one is presumed to know the law, and in cases of doubt can seek advice from counsel. Still there are cases even here in which a person may be ignorant of a rule of law, or may mistake the true effects of such a rule, without being guilty of such negligence as deprives him of the right to relief. Under such circumstances a mistake of law should no more prejudice the maker than a mistake of fact.

In other words, the German court would state the rule thus: Relief against mistakes must depend ultimately on the question whether the party is to blame for them or not. In mistakes of fact he presumably is not to blame (a real mistake being shown), and, therefore, is to be relieved. In mistakes of law he presumably is to blame, but even here may counteract this presumption by showing that his mistake was excusable, and may then be relieved. Of the countless pages in our reports on this vexed question, we know none that contain a better solution of it on principle than this very simple one.

Another case in the same court, also on a question of mis-

\* Decisions of the Imperial Supreme Court of Commerce (Reichsoberhandelsgericht) at Leipsic. March 13, 1874. Band 13, seite 118. Seuffert XXX. 168.



take,\* is worth comparing with several recent decisions of our American courts on precisely the same question. Will a policy of life insurance be avoided by a mistake of the insurer, as to the condition of health of the insured at the time? It was argued for the insurer that such a mistake affected the subject-matter of the contract, and that, therefore, the contract itself was void, there being no real meeting of minds. But the court held that it was only a mistake as to the motives for entering into the contract, and, therefore, did not affect the contract itself, unless there was fraud or improper concealment of the facts by the insured. It will be noticed that no technical doctrines of warranty, etc., figure in the grounds of the judgment, but it is decided on the common rules of contract.

When a life insurance company has paid a policy on the life of a man, killed by the negligence or misconduct of another, (or of a railroad company, etc.), can it recover the amount from him who is legally responsible for the death? This question, which has been decided both ways by common law courts, has also been recently before the Supreme Appellate Court at Berlin,† and by them is answered in the negative. The right to compensation in such cases belongs only to those who have some interest in the thing destroyed, not to those whose loss grows out of a mere contract. And the principle by which, in other cases of insurance, the insurer may succeed to the rights of the party whom he has indemnified, has no application to life insurance, which is not a contract of indemnity at all.

The Court at Leipzig, already quoted, has decided that the German law of June 7, 1871, which makes railroad companies responsible for all deaths not caused by *vis major* or the party's own fault, creates a purely statutory obligation, and not one *ex delicto*, and, therefore, that the company is respon-

\* Sept. 26, 1873. *Entscheid.* Band 11, seite 134. Seuffert, XXX. 320.

† Jan. 19, 1874. *Fenner u. Mecke*, civilr. *Entscheidungen*, Jahrgang 5, seite 160. Seuffert, XXX. 216.

sible for the deaths of passengers caused by accident not coming under the head of *vis major*.\*

The reasoning of the case deserves careful comparison with the well-known English and American cases in which the rule was otherwise settled after great deliberation, as the language of neither statute seems to have had much effect on the decision.

Thoughtful students of politics and constitutional law have long appreciated the value of the lessons to be derived from the "Holy Roman Empire of the German nation," for all peoples, which, like the United States, were trying the experiment of dual sovereignty. Under the greatest diversity of outward forms, it was seen that the questions raised and the issues discussed or fought out, between the Emperor and the Princes claiming territorial sovereignty, were the same in principle with those which have so agitated the first century of the American Union. Perhaps the lesson was none the less instructive, if rightly studied, because the course of events in the two countries has been so different—the older nation falling to pieces in a course of long decay by the growth of the rights and powers of the component parts, until they became in reality independent states; while in the younger the centripetal forces have always kept the upper hand and have gone far—as some think even too far, already,—toward welding thirteen independent states, with their accessions, into a single nation. But be this as it may, it is certainly very interesting to see in the revived German Empire, legal problems working themselves out, which present a remarkable analogy to those so familiar to the American bar of the present day, in respect to the division of jurisdiction between the state and federal courts. An article in the last number of the *Deutsche Justiz-Zeitung*,† discusses the proposed laws by which the jurisdiction of the Imperial and Territorial courts respectively

\* Mar. 5, 1874. *Entscheidungen*, Band 13, seite 71. Seuffert, XXX. 217.

† *Das Verhältniss von Reichs- und Landesrecht in den drei Deutschen Gesetzesentwürfen*. Von A. Küthmann. *Deutsche Justiz-Zeitung*, XII. 73-79.

is to be fixed. The article is too long to translate, and some parts of it would have little interest or meaning for the American lawyer, as for instance the difficulties caused by the distinction between judicial and administrative jurisdiction, which our law and the English get rid of by entirely ignoring the latter. On the other hand the new laws will abolish entirely those ecclesiastical and patrimonial jurisdictions which form so strong a contrast with our American notions of judicial power, and will declare that "all courts belong to the state," in words that we should readily accept, though the principle is so familiar to us that we hardly think of expressing it. Some very curious examples are given of the state of things which this change will destroy. In certain provinces of Hesse Darmstadt, for instance, all matrimonial causes were heard in the first place in the Bishop's Court of Mayence; then on appeal before the Archbishop of Freiburg; and finally, in the third instance, before the Pope—no one of the tribunals belonging to the country in which the cause arose, and whose citizens were the litigants! In Prussia it was the private right of an individual, the Prince of Wied, to appoint a considerable number of district judges.

But passing from relics of the middle ages like these, which are mentioned here only to illustrate the superficial difference of the two systems of jurisprudence, we find their essential sameness when we come to the important question of the relations between the two sets of courts—those of the Empire, and those of the States. Here an American lawyer finds himself on familiar ground. In words even briefer and more pregnant than those which make the Federal constitution, laws, etc., "the supreme law of the land," the German law starts with the principle that "the law of the Empire overrules the law of the state,"\* and it may be worth our while to compare briefly the rules by which this precedence is maintained in practice, with the well-known provisions of our own constitution and judiciary act.

The first difference that strikes us between the German and American systems is one of great importance—one that ex-

\* "*Reichsrecht geht vor Landesrecht.*"

presses much in a few words. With us the rules of procedure are fixed by the states, and the Federal courts for the most part conform to them. In Germany the whole code of procedure, including the rules of evidence, is of imperial origin, and the territorial courts have only to follow. Any lawyer who has studied ever so little the history of his art, can foretell what in the course of time must be the results of either rule. The power that controls procedure, will, in the end, shape the entire law; and in this view the changes that have of late been made in the course of Federal legislation on the subject may prove to be but the thin edge of the wedge. But this is aside from our proper subject, and we do not mean to discuss here the question whether uniformity of procedure for all American courts would be desirable or not. In Germany the advantage, not to say the necessity of the rule, is probably beyond all dispute.

The rule, by the way, applies only to the "ordinary" as distinct from the extraordinary or special (*besonderem*) practice; a distinction we cannot stop to explain in detail, but which may be roughly compared to our familiar distinction between "actions" and "special proceedings." Now the different states of the empire have power by legislation to convert ordinary into extraordinary jurisdiction. Is there not here a means by which the control of the empire might be evaded, if a state were strong enough to make the experiment?

The chief guarantee of the supremacy of the laws of the entire body—Union or Empire—short of physical force, must always be in the ultimate power of appeal. And it is just here that the German system seems to us to be weakest in comparison with the American. We miss any such effective provision as allows any decision unfavorable to the powers of the Union to be taken into its highest appellate court, a provision matchless for purposes of defence, while confining that court to its legitimate sphere as well as any mere form of words can do it. The chief object of the German law seems to be to secure harmony and consistency in the theoretical exposition of the law, not to maintain its practical power. This is effected by the process of *revisio in jure*, somewhat

analogous to our common law writ of error, but still more so to the French process of *cassation*. It is not an appeal, for it has nothing to do with the correctness or incorrectness of the decision below upon matters of fact. There is not even any such device as that familiar to English lawyers, by which a question of fact is turned into a question of law, by means of a motion for new trial, etc. The revision is based entirely on the assumption that the judgment of the lower court is inconsistent with a statute or a settled rule of law. And in the German system of law, this must be a rule common to the whole Empire, or the imperial courts can not take cognizance of the *revision*. If the rule is one peculiar to a single state, then the highest court of that state has final jurisdiction of the case. The analogy with our rule as to the interpretation of state constitutions, laws, etc., is here evident. But suppose the state rule itself is inconsistent with that observed by the higher power? Or to express it more consistently with German ideas, suppose a rule recognized only within the territory of a single state is of such importance in its bearings on the whole theory of law that its proper interpretation is of consequence to the entire empire? The provision against this difficulty is very characteristic of the entire system. The Emperor and his council can provide by ordinance that in such cases the imperial courts have jurisdiction, although the rule is a local one. It is also very characteristic that—for the sake of symmetry, we suppose—they may also provide that those courts shall not have jurisdiction of rules extending beyond any single local jurisdiction, when they are so trivial that their uniform interpretation is a matter of no importance. One can not but be struck here with the difference in the point of view from which the two systems are regarded, and we might almost say constructed. The German regards it as the first object that the law should be a uniform and consistent system. The Anglo-American is comparatively indifferent to theoretical symmetry, if he can furnish a sufficient safeguard against every practical wrong.

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#### *IV. THE COLLATERAL IMPEACHMENT, BY PARTIES AND PRIVIES, OF JUDGMENTS IN PERSONAM OF SISTER STATES.*

The want of harmony among the earlier American cases respecting the force and effect to be accorded to the judgments of sister states, when relied upon in another state of the Union, can not justly be regarded with surprise. The leading enquiry, arising under the constitution and acts of Congress, was novel; the considerations requisite for its solution, largely those of public or domestic policy, involving to some extent the discordant political theories of the relations of the states to each other and to the Federal government; while, upon secondary questions, as the force and effect of foreign judgments, turning to the courts of England—where it might have been thought we could look for certain direction—the decisions of those courts were found variable and conflicting. Moreover, the terms “full faith and credit,” used in the constitution were untechnical and without such exact definition as to satisfy legal accuracy; while the act of Congress of 1790, only prescribed the mode of authentication, and declared that “said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court in the United States, as they have by law or usage in the courts of the states from whence the said records are or shall be taken.”

That the judgments of a sister state are to be regarded as foreign judgments, except as affected by the constitutional provision and the Congressional legislation referred to, is the universally accepted doctrine. But the force and effect of foreign judgments, and the application and extent of this exception, have proven prolific sources of difference. The terms foreign and domestic, in this connection, have not received satisfactory definition; nor is it perceived that one

could readily be given; for Scotch, Irish and colonial judgments are regarded as foreign in England; and it seems in New York\* that the records of the Circuit Court of the United States, sitting in New York, are to be regarded as foreign records, when produced in the courts of that state,† though the contrary has been asserted in Maryland, Alabama and Iowa. Indeed, in *McElmoyle v. Cohen*,‡ the Supreme Court of the United States, after declaring that a judgment of a court of one state, when produced in another, "is to be considered only distinguishable from a *foreign* judgment in this, that by the first section of the fourth article of the constitution, and by the act of May 26, 1790, § 1, the judgment is a record, conclusive upon the merits, to which full faith and credit shall be given, when authenticated as the act of Congress has prescribed," add, "It is, therefore, put upon the footing of a *domestic* judgment; by which is meant not having the operation and force of a domestic judgment, but a domestic judgment as to the merits of the claim or subject-matter of the suit." Nothing, therefore, would seem to be gained in certainty by referring to these classifications, unless, indeed, there had been such uniformity of decision respecting foreign judgments as to leave no doubt upon the general rules applicable to them; such, however, was not the case.

The tendency of the earlier cases in England, prior to the *Bank of Australia v. Nias*,§ seemed to favor the proposition, that foreign judgments were merely *prima facie* causes of action, and did not preclude an examination on the merits. But the result finally reached in England is said to be, that every plea that goes to the merits of the action on which the judgment is founded, is bad, unless the judgment be otherwise subject to impeachment.

Under the influence, doubtless, of what was understood to be the English rule, it was held, at an early day, in this country, that foreign judgments were *prima facie* only; but in the late case of *Lazier v. Westcott*,|| the conclusiveness of foreign

\* 17 Johns. 272.

† See also remarks of Brockenborough, J., 8 Leigh, 642.

‡ 13 Pet. 312.

§ 16 Q. B. 717.

|| 26 N. Y. 146.

judgments against impeachment on the merits was strongly upheld, the late English rule approved, and the language of Judge Story in his Conflict of Laws, § 607, referred to and commended. The American cases are not, however, numerous; the question itself is not one within the revisory jurisdiction of the courts of the United States, and it would be hazardous to predict unanimity of decision.

Under the revisory jurisdiction of the Federal courts, over state courts, in all cases arising under the constitution and laws of the United States, the decisions of those courts, or at least of the Supreme Court of the United States, upon questions that arise where the judgment of one state is relied upon in another, must be accepted as settling the rule of decision; and it has been remarked, that heretofore in such cases, deference has ever been justly and generously yielded by the state courts to that authority.

Before the celebrated case of *Mills v. Duryee*\* became generally known, it was commonly held by our state courts, that judgment in one of the states did not preclude an examination on the merits, when pleaded in another state; and that, in brief, the only effect of the constitutional provision and the Congressional legislation pursuant thereto, was to prescribe a mode of authentication which it is believed has never been held exclusive. But in that case it was decided that such judgment, when produced in another state, is to be regarded as a *record* in the strict technical sense of the term; that the proper plea to a suit based thereon was *nul tiel record*, and that the plea of *nil debet* was bad.

After *Mills v. Duryee*, it would seem that, in defining the force and effect of the judgments of sister states, when so relied upon, it only remained to deny or duly restrict within proper limitations, the two branches of the proposition so often stated in conjunction, viz: that such judgments can only be attacked on the ground of want of jurisdiction, or for fraud.

Considering the latter clause of the proposition first, it is found, upon careful review of the authorities, that the asser-

\* 7 Cranch, 481.



tion that such judgments, so produced, are liable to be attacked for fraud, is utterly wanting in support in the cases adjudicated, and finds its only authority in the loose expressions of text writers, or as mere *dicta* by the judges. In the case of *Christmas v. Russell*,\* this enquiry, whether the judgment of a sister state could be impeached for fraud, was distinctly negatived; the question was directly presented in this case and decisively met by the Supreme Court of the United States, as above, in conformity with what would seem to be the logic of the conclusion announced in *Mills v. Duryee*.

The other branch of the proposition, viz: the admissibility of attacking such judgments, by parties and privies, for want of jurisdiction in the court rendering the same, has also recently received at the hands of the Supreme Court of the United States the most emphatic decision, though it may with deference be said, that the determination thus reached does not so apparently consist with or flow from the opinion in *Mills v. Duryee*.

Before referring more directly to the very late cases in the Supreme Court of the United States thus alluded to, it would be well to consider what, at the time these decisions were rendered, was supposed to be the law. And here it is not proposed to do more than to state briefly the conclusions arrived at by the learned author of *Bigelow on Estoppel*. That writer in the summation of a review of the adjudged cases on this point, with great legal acumen, announces the following results:

"Parties and privies will not be precluded from enquiring into the jurisdiction—

"1. Where the record is silent on the subject;

"2. Where it recites simply an appearance of the defendant by attorney;

"3. Where it is ambiguous, obscure or inferential.

"Thus far there is no serious conflict, and the law is well settled; but the next step brings us into confusion. It will, however, appear, as we proceed, that the weight of authority is pretty strongly on one side.

\* 5 Wall. 290.

"The question is, whether the parties are precluded from denying the jurisdiction of the court of a sister state, when the record of the judgment contains an averment of matters sufficient to constitute jurisdiction."

After criticizing the case of *Starbuck v. Murray*,\* in which the court say, "Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction; and he ought not therefore to be estopped, by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging a want of jurisdiction," the learned author proceeds to cite with marked approval the cases maintaining the contrary doctrine, and prominent among these, *Lincoln v. Tower*,† and *Wilcox v. Kassick*,‡ and referring to the absence of decision on the question by the Supreme Court of the United States, he says, in conclusion: "It follows from the acts of Congress, that judgments of courts of record are record evidence throughout the Union, and in this proposition all the authorities agree. If, then, the transcript of the judgment of a sister state is a record, it must be entitled to the high credit of a record, in whole and in part, as to every specific essential allegation it contains. Jurisdictional facts are vital parts of the record, and how can it then be said that they may be disputed? If the judgments in question were not records, it might be said with some propriety that more credit should be given to matters upon which an issue was tried, than to any others; but they are record evidence; and in this there are no grades of credibility, and jurisdictional facts are entitled to the same credit as the judgment upon the issues of the case.

"We should then state the rule to be that when the record contains an allegation of specific facts sufficient to constitute jurisdiction, parties and privies are estopped to deny the jurisdiction, in a suit for the same cause of action, unless the record would be inconclusive, in an action upon the judgment, in the state in which it was rendered."

But the Supreme Court of the United States, in the late

\* 5 Wend. 148.

† 2 McLean, 473.

‡ 2 Mich. 165.

case of *Thompson v. Whitman*,\* after it was thought the profession were authorized to presume a different view from the opinion of the court in *Landes v. Brant*,† have in the most unequivocal terms declared that "the jurisdiction of a court by which a judgment is rendered in any state, may be questioned in a collateral proceeding in another state, notwithstanding the provision of the fourth article of the constitution and the law of 1790; and notwithstanding the averments in the record itself."

In *Thompson v. Whitman*, plaintiff sued defendant in the Circuit Court of the United States for the Southern District of New York, in an action of trespass, alleging that with force and arms, on the high seas, the defendant seized and took a certain vessel, property of petitioner, and carried away and converted the same. The defendant pleaded not guilty, and justified by setting up that the plaintiff, a citizen of New York, was engaged in taking and gathering clams with said vessel, in the waters of the state of New Jersey and within the county of Monmouth, contrary to the law of that state; and that by virtue of said law, the defendant, who was sheriff of said county, seized the vessel within the limits thereof, and informed against her before two justices of the peace of said county, by whom she was condemned and ordered to be sold. The plaintiff took issue on the plea, denying that the seizure was made within the state of New Jersey, or the county of Monmouth. On the trial conflicting testimony was given on this point, but the defendant produced a record of the proceedings before the justices, which stated the offence as having been committed, and the seizure as made within the county of Monmouth, with a history of the proceedings to condemnation and order of sale. The defendant relied on the provision of the fourth article of the constitution, and the clause of the act of 1790, already quoted, and asserted that the judgment was conclusive, that this record was a bar to the action, and requested the court so to charge. But the court refused the charge asked, and instructed the jury that said record was only *prima facie* evidence of the facts stated

\* 18 Wall. 457.

† 10 How. 348.

therein, and cast upon the plaintiff the burden of proving the contrary. The opinion of the supreme court was delivered by Mr. Justice Bradley, who said: "The main question in the cause is, whether the record produced by the defendant was conclusive of the jurisdictional facts therein contained. It stated with due particularity sufficient facts to give the court jurisdiction under the law of New Jersey. Could this statement be questioned collaterally in another action brought in another state? If it could be, the ruling of the court was substantially correct. If not, there was error. It is true the court charged generally, that the record was only *prima facie* evidence of the facts stated therein; but as the jurisdictional question was the principal question at issue, and as the jury was required to find specifically thereon, the charge may be regarded as having reference to the question of jurisdiction." The court then pass in review all the cases respecting foreign judgments, decided by the Supreme Court of the United States, and say: "But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to the jurisdictional facts asserted therein, and especially as to the facts stated to have been passed upon by the court." And the conclusion, already quoted, is then announced by the court, with but little discussion of doctrine, and but slight allusion to the attention the question had previously received at the hands of the state tribunals.

Reducing the statement of the proceedings had in the New Jersey court as given by the reporter, to its elements, we find—

1. That it was a proceeding *in rem* under a police regulation;
2. It does not appear that the owner of the vessel was personally served, or that he appeared in person or by attorney and pleaded to the action;
3. It would seem to have been before an inferior court of special jurisdiction.

In the opinion of the court no reference is made to either of these features of the case. On the contrary, the court must of necessity be understood to hold, that when the judg-

ment of a court of general jurisdiction, rendered in a sister state, is relied upon in another of the states of the Union, it is competent for the parties to such judgment to allege and prove want of jurisdiction in the court rendering the judgment, although the record recite every essential jurisdictional fact.

This was a question of great gravity, and, as stated, of first impression in that court; it had been variously adjudicated by the state courts, in decisions replete with logical force and legal learning; eminent text writers of diverse views had treated upon it, and among them Mr. Bigelow, in his work on Estoppel, where after an elaborate review of the authorities, upon principle and the weight of authority as well, he arrived at a different conclusion from that announced by the court; and it is sincerely to be regretted that the case of *Thompson v. Whitman* does not carry to the profession and those courts with whom it must constitute the rule of decision, a conviction of more careful and considerate attention.

It may be that, had the court considered the several points suggested above, they would have arrived at the same conclusion as announced; that it was immaterial whether the judgment be considered as *in rem* or as *in personam*; whether as the mere enforcement of a police regulation or of a general demand between private parties; whether there was personal service or appearance and issue joined or not; whether it was an inferior court exercising special jurisdiction, or a court of general jurisdiction. But it can scarcely be denied that these were proper subjects for consideration, reference and decision, or that their omission will have its influence upon the rank of the opinion.

If anything was wanting to point out with certainty the enlarged scope intended to be given this decision; all doubt is removed by the case of *Knowles v. Gas Light and Coke Co.*\* The judgment was by default, in the Circuit Court of Cass County, Indiana, on a return of the sheriff showing personal service; and this judgment was sued on in the Circuit Court of the United States for Minnesota. The defendant offered to prove that he had never, in fact, been served with

\* 19 Wall. 58.

process, and that, therefore, the court had never acquired jurisdiction of his person. And the case being before the Supreme Court of the United States on writ of error to the Circuit Court for Minnesota, on exception to a ruling of the judge, holding such evidence inadmissible to contradict the record, the court, referring to the case of *Thompson v. Whitman* as decisive authority on the question presented, say: "In our opinion the defendant had a right to show by proof that he had never been served with process, and that the Circuit Court of Cass County never acquired jurisdiction of his person."

This line of decision certainly does not seem to consist with the conclusiveness understood to attach to records; for it is said, "They import absolute verity and cannot be contradicted;" nor does it seem to accord that respect to the proceedings had in the courts of a sister state that might have been expected or that might have seemed due under the constitution and acts of Congress.

At the same time it is well to consider that these decisions uphold the general and very salutary maxim of the law, that the jurisdiction of the court rendering the judgment is always open to enquiry; that no one shall be concluded as to his rights without his day in court, and that a citizen ought not to be compelled to resort to foreign tribunals to remedy a wrong imposed on him by those courts. And, no doubt, when these cases come to be applied and critically examined, the fact that the defendants, in both of the original judgments, were non-residents of the states where the judgments were rendered, will be considered as largely restricting the general expressions contained in these opinions.

Certain it is that no court has gone farther than the Supreme Court of the United States in refusing to receive a plea or hear evidence denying the jurisdiction, after pleas to the merits.\*

Nor, in the light of these decisions, can it be doubted that when judgment has been rendered in one state, after due ap-

\* See 1 Pet. 498; *Smith v. Kenochen*, 7 How. 216; *De Sobry v. Nicholson*, 3 Wall. 420.

pearance or service and pleas to the merits, jurisdiction appearing of record, and such judgment comes afterwards to be sued on in another state, the court would refuse to entertain a plea to the jurisdiction of the court rendering the judgment, which did not at the same time negative the appearance, or personal service of process within the state ; that, in other words, the only effect of the cases of *Thompson v. Whitman*, and *Knowles v. Gas Light and Coke Co.*, is to allow one against whom the record of the judgment of a sister state is produced, to allege and prove *that in law and in fact he was not a party to the proceeding.*

ROBT. G. STREET.

GALVESTON, TEXAS.

## *V. THE BAR AND GROWTH OF THE LAW.*

In a recent article in this *REVIEW*, the agency, direct and otherwise, was spoken of, which the courts of England and our own country have in promoting the growth of the common law, and in supplying the defects in that system which time and circumstances bring to light from time to time. While it often falls to the judges of those courts to declare new principles, or a new application of such as are already settled, the lawyers who take part in the discussion of those questions, often have quite as much to do in originating the views that ultimately prevail as the judges themselves. And the subject would be obviously incomplete if, in speaking of the growth of the law, we passed over in silence the influence which the bar of a country has upon the character and condition of its laws. To present this in its true light, it will be necessary to inquire under what circumstances the institution of lawyers had its rise, and under what conditions of government their influence has been the most directly felt?

The institution is evidently the outgrowth of civilization, and its power has been strongest among free nations, where liberty is tempered and regulated by law. Barbarous tribes have no occasion for courts or lawyers, and law and advocacy are little heeded under the rule of a despot. The restraint of crime by law, instead of redressing it by revenge on the part of such as are injured, is a decided step in the progress of civilization. Nor is it till the idea of property and of trade, and the obligation of contracts has been entertained by a tribe or people, that the need of courts and trials at law begins to be felt. Even then we are taught by history that the system of advocacy by men other than the parties in interest themselves, is altogether subsequent in time to the institution of courts for the trial of questions in controversy. Indeed, we are told that such a class was unknown to the Jews, and



that that body of men whom the Saviour denounced as "lawyers," had little in common with those who have the name in our day. They are said to have been "functionaries, who devoted themselves to the study and explanation of the Jewish law, particularly the traditionary or oral law," speculative thinkers rather than practical actors, and had much in common with the Scribes and Pharisees. And the woe, we apprehend, was not intended to extend beyond the generation to which it was addressed.

Under the laws and their administration in Athens, there is said to have been a like absence of a class of legal advocates. Nor is it difficult to see why such should be the case. Their juries were little better than a mob, varying all the way from fifty to five hundred and more in number, who settled both law and fact, and upon whom it would have been mockery to expend either learning or logic. It was, accordingly, left to the parties themselves to conduct their own causes in court. And this was only relieved at last by written speeches prepared by others and spoken by the suitors, which it was not difficult to adapt to the prejudices and self-interest of the populace, which were the common grounds of appeal to which these arguments, on all popular issues, were addressed. Antiphon has the credit of having been the first to furnish such speeches to order, though it afterwards became a regular branch of business. They were a kind of *lucus a non lucendo* lawyers from neither knowing nor practising law. Either to avoid being bored by these speeches being too long, or for some other cause, it is said that the courts limited each party to the time it would take for a certain quantity of water to run through a Clepsydra, a kind of hour-glass; and when his water was out, to borrow a phrase which may have had its rise from this custom, he had to "dry up."

The Democracy of Athens did not survive long enough to develop a class of lawyers properly so-called, though the fame of her orators, as well as of her sophists and rhetoricians, has come down to us as the growth of her popular form of government.

The earliest home of lawyers of which we have any authen-

tic account, was Rome. But even there it was only after the lapse of centuries, that the Roman bar attained the meridian of its power and fame.

It was unknown, as in all barbarous tribes, until the nation had made considerable advances in civilization. It had its origin in the relation between the patrician patron and the plebeian client, which had no connection, at first, with any particular knowledge of law, though the patron was bound to assist his client in his law suits, as in other matters requiring counsel and aid. These services, at first, were rendered gratuitously, and when, at last, a class of legal advocates who understood the law and served their clients in court, took the place of these patrons, the theory of a gratuitous service was retained. This was afterwards enforced by a law in the sixth century from the building of the city, and by a renewal of the same law two centuries afterwards. This law was at length modified in the time of Claudius, limiting the fee which an advocate might retain to a sum not exceeding £80. And even then, whatever was paid for professional services was regarded as an *honorarium*, and could not be collected by suit. It may not be familiar to every one, that such is the law in England to-day, in respect to the compensation of barristers, as poor Kennedy learned to his cost after years of unwearied labor, and a successful contest for his client, under a solemn promise to compensate him, in a matter involving an immense sum which he won, and the client took and left him remediless.\*

But with all these checks and restraints upon the Roman bar, it is not, indeed, surprising that they contrived to evade them, but the extent to which they did it, might well excite a feeling of envy in the minds of some of our thriving lawyers. Without descending to particulars, it is sufficient to speak of the fees paid to Cicero and Crassus. A single fee paid by Sylla to Cicero on the occasion of his impeachment, is given at £8,000; and if this is a sample, it is no matter of wonder that the traveller is pointed out so many seats of Cicero's luxurious villas all the way from Tusculum to the Bay of Naples.

\* 13 C. B. N. S. 677.

And as for Crassus, his inventory at his death footed up the comfortable sum of three million sterling. He must have had hosts of clients, and every one a Jim Fisk, a Tweed, an India prince, or a railroad corporation, who paid and asked no questions.

Renowned as Rome was for her achievements in arts and arms, for the vastness of her possessions, the splendor of her victories, and the magnificence of her power, for nothing was she more truly illustrious than her law. And to this day she exerts a wider influence and a mightier sway over the nations of Europe through her law, than she ever wielded under her eagles in the palmiest days of her Empire. And not a little of this she owed to the character and courage and learning of her lawyers. No class of her citizens held a higher social rank in the community. Their opinions were even accepted as law at times in the determination of controversies, and from their treatises and opinions, were gathered the largest portions of the texts of the immortal Pandects themselves. They were, in short, law-makers as well as its ministers and interpreters. One third part of the Pandects, we are told, was made up of literal extracts from Ulpian, one-sixth from Paulus and the remainder from other celebrated jurisconsults from Scævola to Modestinus, forty in all. The same was even more signally true of the modern Code Napoleon, of which three-fourths were literally extracted from the treatises of Pothier. From the adoption of the XII Tables, to that of the Code of Justinian, was a period of a thousand years. Its bar, in that time, had its dawn, its meridian and the first stages of its decline. The truly splendid age of the Roman law was from the time of Cicero to that of Alexander Severus, a period of some three hundred years. It borrows a lustre from the brilliant names borne on the roll of its advocates, which is still reflected in its history. And the extent of the influences which the Roman lawyers exerted in the affairs of state may be judged of by the hostility with which they were regarded by the barbarians who overran Rome. They seemed to fear the tongues and feats of oratory of her lawyers more than the spears and javelins of her soldiers, and dealt

with them by cutting off their hands, tearing out their tongues and sewing up their mouths. They knew how to deal with the weapons of soldiers, but could not face the logic of the juriconsults which they knew must, somehow, be suppressed.

Full of interest as is the subject of Roman jurisprudence, and of the part her lawyers took in promoting her wonderful career, our purpose in referring to them has chiefly been to illustrate the connection there will be found to exist between the condition of the bar of a state, for morals, culture and refinement, and that of the people themselves, and how far the one is a type of the other. Beyond that, we have not space to go. The manhood of the bar died out in the decay of the public virtue, till all that was left of its glorious history was the treasured wisdom of a thousand years stored up in the Code and Pandects of Justinian, ready to again vitalize the civilization of Europe the moment the darkness should break, which had settled down over the nations at the overthrow of the Empire, and a new body of lawyers could be trained to be its ministers, in the schools of the civil law, and a printing press should be ready to supply the means of diffusing the light of its knowledge. In the language of another, "Rome was the vessel in which the treasure of ancient civilization was preserved, till the nations of modern Europe were ready to receive it." "Rome with the two great, the only products of her genius, the arts of war and law, did a service to the world only less than Greece, with her universal culture, her arts and her philosophy."

If now we come down to the jurisprudence of England and our own country, we shall find the same waiting for the coming of lawyers until civilization had, in a measure, dispelled the barbarism of a slavish age, and the need of such a body had begun to be felt for giving order and consistency to society. It is natural that superstition should precede the action of free and intelligent thought. And we find it stated, accordingly, that during the long period of Saxon rule in England, there was no class answering to modern lawyers. The nearest approach to it was the "*for-speakers*" who were

employed by the manslayer in cases of homicide, to negotiate the terms upon which the friends of the person slain would accept a composition. Indeed, while trials might be conducted by ordeal or wager of battle as a mode of proof, it must have been an awkward kind of practice to engage as an attorney in such a lawsuit. The only persons, in fact, who pleaded the causes of others before the courts, were the priests. Nor did the custom of employing them for the purpose cease until the time of Henry III., when the Bishop of Salisbury, in order to reform the bar, or the clergy, and it does not appear which, forbade the clergy of his diocese engaging in such unclerical contentions; though it is said that the recalcitrant brethren contrived a way, for awhile, to evade the edict of the Bishop, by donning wigs to conceal their tonsures, and gowns to disguise their priestly garments, which, it is contended, was the origin of the modern array in which the members of the English bar present themselves to the gaze of laymen. And priests still continued eligible to the bench of the English courts until the 6th of Edw. I.

In speaking of the rise of the English bar, it is not our purpose to dwell upon the origin of those arbitrary distinctions which have so long prevailed between the grades and classes into which it has been divided, whereby, for example, the serjeants enjoyed a monopoly of the business of the court of common pleas, and an impassable gulf was placed between the barristers and attorneys. It may be remarked, however, in passing, that the establishment of the attorneys as a distinct body goes back to the time of Henry IV. And nothing short of a moral earthquake can probably ever obliterate this line of separation. Our chief object, to repeat, has been to appeal to a proper sense of self-respect on the part of the bar, by pointing out the relation which the bar of every civilized country has held to the moral, social and political condition of its people, and the fact that the rank and condition of the bar is no uncertain type of the civilization of the people with whom it is associated.

If, in fact, there is this relation, the profession owes it to itself to act up to it, in the example it holds out of high pur-

pose and honorable attainment. That there is a natural antagonism between lawyers as a class, and the demagogues who, from time to time, like the barbarians of old, aim a blow at the peace and prosperity of communities, was shown in the famous insurrections of Wat Tyler and Jack Cade, whose hate was in an especial manner vented against these and everything with which they were connected, killing such as fell in their way, burning the temple and threatening the entire destruction of the Inns of Court. They sought to strike down the government and all law through its ministers.

There have been circumstances, indeed, which have always given weight and importance to the English bar, independent of the personal qualities of its members. The judges have, for centuries, been appointed from its barristers. The Chancellors, raised also from the bar, have not only been officers of the highest judicial rank, but political also. So its members have held seats in Parliament, and places in the Cabinet. And in this number we do not mean to include mere politicians bearing the name of barristers, but that class to which Romilly and Mackintosh and Brougham belonged, who could be hard-working lawyers, as well as high-minded statesmen. In addition to this, the bar of England has wisely taken under its own charge, its integrity and its honor. Its associations under the name of Inns of Court, have controlled the admissions to the bar, and prescribed the requisites preparatory to such admission. Lincoln's Inn dates back to near, if not quite, A. D. 1300, and the Inner and Middle Temple are of the days of Edward III. So the rigid and inflexible rules of distinction and precedence between the barrister and the attorney, as well as the involuntary respect with which the barrister in *stuff* looks up to one in *silk*, have done much to keep alive an *esprit du corps* among its members, and a jealous oversight of the professional deportment of the humblest of their number. And even now the fraternity is awake to the interesting problem, what can be done by way of educational training, to fit young men to worthily sustain the prestige of its honorable fame? How this can be maintained with its rows of briefless barristers who crowd

the narrow benches of Westminster Hall, is a question which puzzles the brain of any man who looks, for the first time, upon the array of gowns and wigs which throng the crowded purlieus of the English courts.

Of the power of the English bar, however, it is difficult to speak too strongly. The English people see in the English law and its officers, a living principle, as it were, of power and loyalty to which every citizen instinctively pays homage. And this spirit is animated afresh with every new manifestation of the learning, eloquence and professional fidelity which is witnessed in her courts, or exhibited upon her professional arena.

These remarks which have unintentionally grown beyond, we fear, our reasonable limits, will compel us to speak of our own bar in more general terms than might otherwise seem just. Our purpose, however, again will be, as we have already said when speaking of other bars, to show the relations of our own to the general culture, the social elevation, and the habits of free and independent thought of the people, and in what manner they act and react on each other.

Our fathers brought with them the English common law, as it was construed and understood in the days of the Commonwealth. They were too poor, however, and too busy in their stern struggle for life in their new homes for many years to furnish employment for a class of learned lawyers. But these came at length with the birth and development of trade and business, and the necessity of solving the questions of social and political interest which grew out of the transfer of a thoughtful, free and independent people, trained in the notions of a high civilization, to a new and distant region. The bar of the colonies, especially of New England, grew and spread itself, in time, into the considerable towns, and by indoctrinating the colonists with a knowledge of their rights as Englishmen, under the common law, probably did more than any, and, we might almost add, all other classes, to prepare the minds of the people to understand and maintain the great and vital principles of civil liberty upon which the Revolution was based and its ultimate triumph achieved. And when the

fate of the nation, for all time, turned upon the question of a Federal Union under a written constitution, the names of the illustrious men of the convention, and those who, by their eloquence and persuasion, secured its adoption by the people, recall the decisive part which the strong men of the bar took in establishing the frame-work of the government under which the country has become great and renowned.

In some respects, however, the condition of the American lawyer differs from that of his English brethren. The bar to which he belongs is democratic in its constitution, and comes down to and mingles with the people instead of being a close corporation of self-regulated associates. Then again, as a citizen, he meets his fellow citizens at the primary meetings of the people, in helping to shape the general and domestic policy of the state, and shares with them the duties and responsibilities of municipal office, and, at times, represents them in the state legislatures or in the halls of Congress. His duties in court, too, bring him directly into contact with the people. And in these various ways, a body of men whose business it is to originate active thought, to gather up stores of wisdom and learning for the very purpose of influencing the wills and judgments of others, are brought into active communication with the strong men in the community, upon matters upon which they are too much engrossed in their own affairs to study and form opinions for themselves. And if the bar is, in fact, a learned, high-minded and honorable body of men, it can hardly fail in this way to make its influence sensibly felt upon the tone of public sentiment, and the standard of public virtue, by every rank and condition of society around them. On the other hand, if the standard of a bar for truth and honor is low, and this is seen in the conduct and deportment of its members in court, and in the administration of the law, its influence reaches other departments of business, and the whole community suffers a blight. But what is more to our purpose, such a state of things acts and reacts upon the law itself. A nation, it has been said, is never better than its laws, and we have only to recall the connection which the body of the lawyers in a free state has with the



formation and growth of its unwritten law, and how that law again reacts upon the citizens who compose it, to see that we have not overstated the responsibility which rests upon the bar to maintain its integrity unimpaired.

In the recent article in this REVIEW upon this subject of the growth of the law, to which allusion has been made, the part taken by the courts in acting as its oracles was dwelt upon at a considerable length. But in working out what these laws are and ought to be, the action of the bar is scarcely less easy to be traced than that of the judges themselves. The functions of the bar are, in this, a complement to those of the bench. It is from the sharp contentions of opposing counsel at the bar, that the judge is the better able to arrive at a satisfactory conviction as to what rule of law will best meet the requirements of the people's needs. These advocates, by the very nature of their study and daily intercourse with the business interests of the community, become the unconscious organs and interpreters of the prevailing sentiment and will of the people. They are fitted for this delicate office by the very training through which they attain eminence in their profession. Not a few of them spring from poverty, and learn experimentally the special wants and needs of every stratum of society through which they rise, and they learn men, as they do their books, by daily study of what there is in them. Nor is it too much to claim for the bar of our country that its agency is constantly felt in giving character and effect to our laws, and thereby reaching the sources, and giving direction to the current of the moral, social and political thought and feeling of the whole people.

If we have not overestimated the relation of the bar to the great interests of the people, it becomes a question of deep moment to the country, what are the promises it holds out in the future. We have seen what it did in the early stages of the Republic, and how it has helped to build up our present system of government and law. But as we contemplate its present condition, we can not but remark the radical changes which have come over its business and its relation to the community at large. Instead

of being scattered among the towns and villages of the country, as formerly, its members are concentrating every year more and more into the centres of business, and, in this way, withdrawing themselves from a contact with the people in the way of social intercourse and political influence. In the next place, not only has professional business been essentially changed to conform to the changes which have been going on in the general business of the country, but also in the mode of doing it. Instead of the same practitioner having to be an adept in the various topics and departments of the law, we find the profession dividing itself into specialties, and particular routines, and many of these having little to do with what is going on in the world around them. There has been, moreover, a process of equalization going on in the bar, by means of education being more generally diffused, the effect of which has been to detract from the personal weight and importance which once attached to the names and opinions of particular lawyers who were the most frequently before the public as leaders of the bar. Not that the average of the bar is lower, but the absence of that prominence of a few which was once observable, has led to the impression that it has lost this class of great and illustrious men it once had.

But the greatest danger to the character and influence of the bar grows out of the politics of the country. The increased expenses of living, and the increased rates of compensation for professional services, have withdrawn the higher classes of the profession from the arena of politics, and left it to an inferior class, who make politics a trade, and office a means of livelihood, and grow unscrupulous in the means of attaining it. And the moment the public have reason to suspect that the motives of a man are sordid and selfish, his opinions cease to influence the sentiments or opinions even of those who, by stress of party discipline, may vote him into office. And the consequence is a growing impression, that a political lawyer is no longer to be associated with statesmanship or moral power.

It remains to be seen whether anything, and if so, what, can be done to elevate and restore the bar to its pristine rank and

influence. To hold the same relation to other business and callings which it once had by education and intelligence, requires a new departure in the process of intellectual culture. Our colleges were once well-nigh monopolized by young men preparing for what were called the learned professions. Whereas, now, science, in its various forms, is asserting its ascendancy, and men in every department of business are educated upon the same basis of mental discipline and culture as those who are to live by the fruits of such a profession. And while this has been in progress, a power has been developed which underlies both social and political progress in the land—the Press, which has gone far towards equalizing distinctions which had their origin in the training of the schools. The problem, therefore, is a most interesting one to the profession, what is to be done to retain the social and political influences which have been heretofore accorded to it? One thing is, to make the necessary advance in learning and trained ability, and another is, to preserve unimpaired the high purpose and manly integrity which have characterized the men it has been the most ready to honor. The profession, as a body, should hold in contempt the truckling spirit of subserviency which seeks office by dishonorable means or for dishonorable purposes.

But we have no space to pursue this thought, and can only add a word to what we have already said, of laying a proper foundation for the higher education which is to sustain the profession in its relation to the advanced condition of other departments of honorable labor and duty. Such an education can neither be supplied by genius, nor the graces of rhetoric or oratory. Its purpose is to learn how to master the laws of science in its connection with the duties of human life, and the organization of political society. And to this end, its foundations should be laid in the processes of elementary training and instruction. It is with this view that schools have been founded to take the place formerly held by the practical teachings of an attorney's office. It is, doubtless, an important step in the right direction; but if it stops where it now stands, the work will be but half done. In some of these the entire

associate, or from some other cause, he rarely afterwards attempted to take the lead in forensic discussion, and was much more solicitous of building up the fame of Mr. Prentiss than of advancing his own.

Judge Guion was always more successful in addressing juries than he was in the argument of mere legal questions. In the defence of criminals he sometimes spoke in a manner calculated to elicit much commendation. The last time that I remember to have heard him in a capital case was in the defence of a man called William A. Hardwicke, who was charged with having committed a most atrocious murder. Hardwicke had in some way managed to enlist the sympathies of Judge Guion very deeply, and in his defence all his powers as an advocate were fully put in requisition. The case was one of the greatest difficulty, and the alleged outrage had called forth much popular indignation. The victim of Hardwicke's ruffianly malevolence was a colored man whom I knew very well, and who was under excellent character. For some unknown reason Hardwicke had conceived for him a strong feeling of hatred, and had, apparently without any reliable evidence of the fact, charged him with having stolen from him some article of personal property of no considerable value. He appears to have gone to his cabin at midnight, dragged him forth from his bed where he was lying by the side of a sick wife—after which, with the aid of several miscreants of his own stamp, he tied him across a barrel, and inflicted upon his bare back more than a thousand stripes. When the poor creature was released he was found to be in a dying condition, and only survived a few seconds. In the intenseness of his agony, he had bitten his tongue in two. An honest and enlightened justice of the peace, sitting as a court of inquiry, had sent Hardwicke to jail; an application for his discharge on bail had been denied; an indictment had been regularly found against him, and after a few month's delay, Hardwicke's trial came on in the Circuit Court of Hinds County, and in the town of Raymond. The offender was prosecuted by a very able district attorney, and with as much of rigor as the law allowed; but when Judge Guion entered upon the

defence of his client, he very soon convinced many of his listeners that in no case should negro evidence be allowed to prevail against a member of the proud Caucasian race; and, as the evidence against the accused was mainly of that character, he insisted that it should be altogether thrown out of the case. After this, when the plausible and captivating advocate suggested the extreme *impolicy*, in the then existing condition of the country, of having a *white man hanged for punishing a negro for theft*, the case was well nigh won. Then came an animated and touching peroration, under which both jury and bystanders were melted to tears, and the *oppressed* and *persecuted* Hardwicke was in a few moments strutting forth from the court-house, and hurrying towards a neighboring tippling-shop, purse in hand, for the purpose of *treating* to liquor all who were willing to drink in honor of his deliverance.

For a year or two previous to Judge Guion's decease, he held a judicial appointment, and presided in a highly satisfactory manner in the several courts of the judicial district in which he had so long resided.

Among the contemporaries of the personages I have just been endeavoring to portray, there were several prominent attorneys to whom I will here cursorily invite the reader's attention.

Eugene Magee was by birth an Irishman. He had been educated with all the care bestowed on favorite pupils at the institutions of the Jesuit order. He is conjectured to have been intended for the priesthood, but, on arriving at maturity, betook himself to the more congenial vocation of the law. He was a most ripe and accurate scholar, and had given much attention to works of general science and literature. In legal learning he was by no means deficient, and much excelled in the drafting of business papers of every description. In the argument of a question of law, and especially of such as arose out of the *pleadings*, he was singularly acute and lucid, and displayed a concise vigor and a winning felicity of expression which made it quite a pleasure to listen to him. At times his sparkling vivacity and caustic humor—which ren-

dered him the terror of slow-minded plodding attorneys, tended much to relieve the dull monotony of ordinary court proceedings. He was quite a favorite in social life, and was the head of a charming family circle. He died very suddenly a few years after my acquaintance with him was formed, of a slow pulmonary malady with which he had been long afflicted.

His associate in practice was Colonel George Coalter, whom I had known for some years previous to his migration to the state of Mississippi. He was born in Virginia, had spent much of his life in Tennessee, and had then practiced in the courts of Alabama for many years, where he is doubtless yet remembered. He was a most pains-taking and laborious office lawyer, and a most persevering student. His mind was exceedingly slow in its movements, and he had not the least relish for intellectual *novelties* of any description. His early education was singularly defective, and his reading had been confined exclusively to law books. He was devoid of all rhetorical grace, and was particularly sluggish and awkward in expression. By dint of extreme industry and attention to business he had acquired a considerable number of *paying* clients; and his quiet and unassuming manners enabled him at last to rise to the bench of the circuit court, where he got along somewhat better than might have been expected; committing, during his few years of judicial rule, no notable blunder, and giving no special offence in any particularly influential quarter, so far, at least, as I have obtained information as to this matter.

Alexander G. McNutt, who became in after life very extensively known as an active and bustling politician, settled in the city of Vicksburg at a very early period—I should say about the year 1820. He attracted no notice as an attorney for some years, and fell into a state of almost absolute destitution, from which he ultimately emerged by the kindness of a Mr. Hough, a merchant retiring from business, who placed in his hands for collection a large number of outstanding claims, by industrious attention to which, with such assiduity and success as strongly recommended him to others of the creditor class, by whose patronage he ultimately grew rich.

He had so little confidence, in the early part of his career, in his own powers as a speaker, that he seldom attempted to argue a case, but generally employed some brother attorney to represent him when a legal argument had to be made. On turning his attention at last to politics, he evinced much capacity, and in a few years managed to become a recognized Democratic leader in the state legislature. He afterwards became governor of the state, and was able to secure a re-election to this position. He was regarded as absolutely invincible, until, becoming a candidate for the United States Senate, he was imprudent enough to attack with the weapons of sarcasm and ridicule so large a number of the influential members of his own party, that he was easily beaten before the legislature for the position which he had sought so ardently, and retired to private life. He is now universally admitted to have been a man of considerable ability, and to have acquired in his latter years such adroitness and skill as a political speaker that few deemed it prudent to encounter him. He died in the year 1848. Mr. McNutt, perhaps, accumulated as much money by the practice of the law as any barrister that Mississippi has known.

A very worthy gentleman who is now a resident of Louisville, in the state of Kentucky, I found engaged in the successful practice of law in Vicksburg in the winter of 1831. I allude to Judge William A. Bodely, who, whilst he remained in Mississippi, deservedly held a high rank among the barristers with whom he was thrown into competition. He had enjoyed many educational advantages in Kentucky before his migration to the South, and his professional training had been thorough. His industry as a lawyer was such as acquired for him very quickly a respectable practice. He spoke well, wrote better, and was exceedingly agreeable in social commune. He was for a short time on the bench, and whilst there demeaned himself so as to give general satisfaction and add not a little to his previous reputation. I was glad to find him six years ago a prosperous lawyer in Louisville, and but little oppressed by the weight of years.

Towards the close of the last century, a very worthy Dutch

family was residing in the town of Lebanon, Tennessee, now so celebrated for its institutions of learning, and especially for its law school. The Yerger mansion is still standing, and in a comfortable state of preservation. In this house were born eight worthy gentlemen, all brothers, and all but one of them practitioners of law. I have only room at this time to notice specially three of them.

The eldest of these brothers, George S. Yerger, was at one time a prominent member of the Nashville bar, and officiated for some years as reporter of the judicial decisions of the Supreme Court of Tennessee—at first alone, and afterwards with a younger brother. Between the years 1838 and 1840, all of the Yerger family whom I have known located in the state of Mississippi. When I first saw George S. Yerger, he was apparently in the prime of healthful and vigorous manhood. His manners were marked with much simplicity and frankness, and he evinced a gentleness and placidity of temper which it was delightful to behold, and which was well calculated to enlist in his behalf the warmest sympathies of those with whom he came in contact. His countenance beamed with benignity, and his voice possessed a sweetness and kindliness of tone such as is seldom found in the possession of the rougher sex, and is of almost irresistible potency in social intercourse. He brought with him to his new home a high reputation for legal learning, and this reputation he succeeded in retaining unimpaired up to the last moment of his life. His learning was chiefly such as he had derived from law books, and this he had stored away in a memory of wonderful retentiveness, and in a form so admirably digested and methodized as to be ready for use at any moment when it might be wanted. Though ever one of the most laborious men in his profession I have ever known, yet he always found time for performing all the duties of kind neighborship, and for amiable and refreshing relaxation in the domestic circle. He possessed a clear head, a sound and generous heart, and was alike devoid of envy, of low selfishness, of narrow and irrational prejudices, and of overweening ambition. His impulsive nature was easily roused, but never ran into excesses



of any kind. He had studied his profession in a somewhat irregular manner, but he had treasured up a vast fund of legal learning, in a great degree derived from his study of adjudged cases, but which he had thoroughly digested and could promptly use in citation without being compelled to hunt for the volumes containing them in huge libraries. He always spoke with animation, and sometimes with no little fervor and emphasis. His manner was uniformly easy and natural, his diction chaste and unpretending, and his gesticulation decorous and impressive. No man ever heard him indulge in extravagant flights of imagination, give utterance to coarse and ribald invective, or pour upon a respectable antagonist streams of low and heartless ridicule. Nor was he at any time heard to talk merely for the purpose of display—as the custom of some is—or in reference to matters not properly appertaining to the case in hand. He preferred taking part in the trial of commercial causes, or in the discussion of such as were of equitable jurisdiction; but he was well fitted, both by temperament and intellectual training, for the vindication of the innocent or the prosecution of the guilty, before courts of criminal cognizance. Of the truth of this last assertion, it would be in my power to cite several conclusive proofs. I shall content myself at this time with the following recital of facts: In the year 1844, a deeply interesting trial for murder occurred in the Circuit Court of the County of Hinds, in which I had the honor of being associated with Mr. Yerger on the side of the defence. Our client was a young man of gentle birth, of spotless character, and of the greatest intellectual promise. Added to all this, he was a young gentleman of most prepossessing countenance and manners, and beloved and respected by all who knew him. He had only a short time before returned from the Virginia University, where he had graduated with great distinction. He was one of many children—all amiable, accomplished and devoted to himself. His mother was yet living, and was universally held to be a rare model of moral excellence and exemplary piety. His father was upon the theatre of active life, and was alike revered for his learning, his domestic and social virtues, and

his elevated patriotism. He had been long a member of the bar of Mississippi, and had recently retired from the position of District Judge of the United States, without leaving a spot upon the ermine which had adorned his person and which he had now voluntarily laid aside. This father was the late George Adams, and the son of whom I have been speaking was the late General Daniel W. Adams, whose feats of daring prowess during the late war have gained for him a high place upon the rolls of chivalry.

As I have already said, our then young and inexperienced client had but just returned home from the university. He was full of youthful enthusiasm, and held his father in almost idolatrous admiration. What was his surprise and indignation at seeing a newspaper, printed in the city of Vicksburg, containing a most cruel and insulting editorial attack upon that father's character? It was but natural that he should proceed at once to that place to demand a *retract* of the offensive article, or some other atonement for the outrage which had been perpetrated. This he did. On arriving at Vicksburg, he felt his situation somewhat embarrassing, for he did not know the editor personally. Being informed that he had gone to dinner, he set out in quest of him; and having reason to suppose that he saw the individual of whom he was in quest approaching him, he advanced towards him with the newspaper in question in his hand, and, pointing to the defamatory article, asked him whether he was the author thereof? This brought on an immediate collision, in which young Adams having fallen to the earth, beneath his antagonist, who was apparently making ready to slay him, he reached up his hand, armed with a pistol which he had succeeded in drawing from his pocket, and, placing it in contact with the hinder part of his adversary's head, fired it, and thus put an end to the contest. All the attendant circumstances clearly indicated that the killing which had taken place had been done in pure self-defence; yet, as it had grown out of a bitter political quarrel then raging in the state, a most furious and illiberal prosecution was instituted. Such was the character of the case in which, as I have said above, Mr. Yerger's

powers as an advocate were to be exerted. I well remember the occasion, and could almost repeat Mr. Yerger's line of argument. To say that it was logical and convincing would be but moderate praise indeed. It was one of the most compact, lucid, and overwhelming specimens of reasoning and pathos combined that I ever witnessed. Deeply were his own sensibilities enlisted, and deeply did he enlist the sensibilities of all who were in hearing of his voice. When he closed his speech I felt that our case had been won, and that all further addresses to the jury in behalf of our client would be superfluous. Not a single position which he had assumed were those concerned in the prosecution able either to overturn or seriously enfeeble. The jury brought in a verdict of acquittal in precisely eight minutes.

It was about fifteen years after this scene when I was attending court in the county of Bolivar, where his brother, J. S. Yerger, was presiding, that news of the sudden decease of the worthy personage of whom I have been speaking reached that village. Court was immediately adjourned in order to enable all who might desire to do so, and especially his distressed brother, to attend his funeral. His death had occurred under very striking circumstances. He was apparently in usual health, and had gone out upon a deer-hunt. Coming in sight of a fine buck, he fired at him. Seeing him fall, he ran, as is usual in such cases, to make sure of him, and on reaching the spot where the deer was dying, he fell, gun in hand, upon the prostrate form of his victim, and at once ceased to breathe. This was the beginning of sorrows for his amiable and bereaved family, upon whom calamity after calamity has since fallen, of a character more soul-moving and humiliating than anything recorded either in history or romance.

The second brother of the Yerger family, whom I propose to notice, was the circuit judge to whom I have just referred—J. S. Yerger. His mind differed materially from that of his elder brother, already described, and his stock of general attainments was somewhat larger. His mind possessed many of the best qualities which give fame at the bar. His powers

of perception were unusually quick; his judgment strong; his capacity for drawing subtle distinctions such as was in no small degree surprising to men of more dull and sluggish intellect; and he always expressed himself in the very language which seemed the best suited for the communication of his ideas. He had read deeply and generally, and was a good judge both of men and their motives of action. His knowledge of legal principles was wondrously precise and accurate, and I feel certain that his strong and retentive memory never relaxed its hold upon any useful information with which it had once been stored. He was of an eminently sociable disposition, and possessed conversational powers of a most entertaining and instructive character. He was blessed with a rich fund of humor, and excelled in lively and humorous narrative. He had a keen sense of the ludicrous, and could hit off a character particularly marked with eccentricities, or odd ways and notions, to the very life. In the whole course of my travels I have never met with a *nisi prius* judge who seemed able to perform with equal success the duties connected with that position. He was sober, industrious, energetic, prompt in the dispatch of business, gentlemanly and dignified in his demeanor, and in the highest degree civil and courteous towards all with whom he was compelled to have official contact. Judge Yerger delivered, some years ago, several eminently useful and impressive addresses to the grand juries of the courts wherein he presided, which I listened to at the time, and which I hope have been preserved among his papers, and may yet be presented to the public in a more convenient and durable form.

With the youngest of the three brothers of the Yerger family who have been specially alluded to above—Judge William Yerger—I had the happiness of enjoying a close and unreserved intimacy of many years' duration. It is gratifying to me now to be able to remember that I invited him into the first case in which he appeared in a Mississippi court, and that I caused a very respectable fee to be paid to him on the occasion; which same fee, though, I must confess to have very inadequately requited services such as he rendered. He was then

as I conjecture, about twenty-two years of age; and I could not help being most forcibly struck with an intellectual display so very superior to most exhibitions of the kind I have witnessed, and suggesting almost inevitably the examples of intellectual precocity of the younger Pitt and Alexander Hamilton. Mr. Yerger was even then a well read and able lawyer; a ripe and accurate scholar; a profound judge of men and affairs, and altogether free from those trivialities and follies which are the customary attendants of young and unchastened men. He habitually talked and spoke like a man of extended experience; was perfectly at ease in all company, without the smallest approach to effrontery or forwardness. Even when he had but just passed the dawn of manhood, he encountered repeatedly on the forensic arena lawyers of long-established reputation, who were known to have triumphed in a thousand intellectual conflicts, and never did the struggle terminate to his loss of reputation. It is difficult to say whether he most abounded in weighty and profound conceptions, or in apt and appropriate language; but in both these respects he was far superior to what is commonly met with at the bar, or encountered in miscellaneous society. It is almost needless to say that such a personage as this could not lack of professional patronage in the bosom of so discerning a community as that amid which he was now to struggle for fame and fortune. When I spent a few delightful days at Judge Yerger's hospitable mansion in the city of Jackson, in the year 1858, he was, perhaps, near the acmé of his fame. I found, though, to my gratification, that he was still ambitious of increased intellectual culture; that he was diligently keeping up with the literature of the day, and was daily seeking the improvement of his taste by the perusal of the ancient classics. He then seemed to have many happy and prosperous years before him. But alas! he has now gone from the presence of those who loved and admired him on earth, and can no longer interchange with them the language of respect and affection, or discourse in their hearing upon those lofty topics upon which he was once so sagely eloquent.

About the period when the Yergers made their first ap-

pearance in the state of Mississippi, the bar of Tennessee supplied to that of her sister state many other attorneys of ability, whose merits I should be pleased to record, did circumstances admit of it. Let me give a passing notice to a few of them.

William E. Anderson was a native of the county of Rockbridge in the state of Virginia. He was truly a Samson Agonistes, alike in his physical frame and in his gigantic mental proportions. He was considerably more than six feet in height. His shoulders were broad and massive. His limbs were huge and muscular, but of most harmonious proportions. His figure was perfectly erect, even when he was far past the meridian of life. His expansive chest gave shelter to one of the most generous and sympathizing hearts that ever yet palpitated in a human bosom. His physiognomy was most striking and expressive, and when kindled into excitement, as in his latter days he rarely was, there flashed forth from his commanding visage the mingled light of reason and sentiment, the effulgent beamings of which no man ever beheld and afterwards forgot. The temperament of this remarkable personage was what is in general known as the bilious-sanguineous; and it is, therefore, not at all surprising that he was recognized by those who knew him best as a sort of human *volcano*, ordinarily in a state of slumbrous repose, but capable of being stirred into sublime and terrible commotion by some adequate cause, and, in the moment of its fury, menacing with desolation and ruin all the living things of earth that might stand in the way of its overflowings. It is said by those who listened to his magical utterances in the moment of his happiest inspirations, that his voice exhibited a compass and power almost superhuman, and that his most exalted tones were sometimes distinctly heard to the distance of half a mile. He has left behind him the reputation of having never been a very diligent student of the learning appertaining to his own profession. He was certainly very fond of desultory reading. All admit, though, that he was by no means deficient in legal lore. Judge Anderson was a man of a cheerful and sympathizing turn of mind, and took

much delight in scenes of innocent festivity. I can myself vouch for his often saying very lively and witty things, and that he occasionally was heard to sing a mirth-moving song at the hour of midnight, for the entertainment of some of the more genial of his brethren of the bar, to their infinite merriment and gratification.

Andrew C. Hayes is yet well remembered by many of his surviving friends and early associates in Tennessee. He was also a native of Rockbridge county, Virginia, and owed his education to what was formerly known as Washington College. He removed to the state of Mississippi in the year 1837, where he made many friends, by whom his sudden decease a few years after he came among them, was very much regretted. He was a person of quite an original turn of mind, and was accused of not a little eccentricity. He did not profess ever to have been a very close student of his profession, from which, I am confident, he would at any time have withdrawn, had circumstances permitted. He sometimes spoke at the bar with considerable vivacity and force, and was certainly one of the most kind-hearted and companionable men I ever knew. He is reported by his early Nashville acquaintances to have officiated in Tennessee for some years, anterior to his removal to Mississippi, as a district attorney, and to have performed the duties of that position with much fidelity and success. He was much noted, when I knew him, for an unaccountable forgetfulness of names, and for his addictedness to unseasonable fits of abstraction, which often caused much innocent amusement in the court-house and elsewhere.

Colonel Hayes—as he was commonly called—commenced his career in Mississippi in connection with a gentleman who has since acquired much reputation in several states of the Union, and whose life has been quite an eventful one. I regret not to be able to speak more at large of him on this occasion—for Volney E. Howard was certainly no ordinary man. Born in Maine, he came to Mississippi when very young, and at once engaged in politics. He was for some years editor of the *Mississippian*, a newspaper yet, I believe, published, and

wielded for several years much influence over the affairs of what was called the Democratic party. He was a caustic and trenchant writer, and many suffered under his editorial castigation, both of his own and of the opposing political faction. For several years he was reporter of the decisions of the High Court of Errors and Appeals of Mississippi, and co-operated with the late Anderson Hutchinson in bringing out a new edition of the Mississippi Code. He afterwards removed to Texas; was one of the representatives of that state in 1850, and took an active part in securing the adoption of the compromise measures of that period. On the admission of California, he was sent out in an important official character to that new and rising state, and is understood to have there been exceedingly successful in the acquisition of both fame and fortune.

I have had occasion, in speaking of General Howard, to mention a name which springs a thousand painful and pleasant remembrances of the past. Anderson Hutchinson was a native of Greenbrier county in the state of Virginia. He here received a good English education, became familiar with the forms of judicial proceeding, whilst assisting his father in performing the duties of clerk of the courts of Greenbrier county, and removed, on attaining manhood, to Knoxville, in East Tennessee, where he read law and obtained a license to practice. Soon after this he joined the celebrated William Kelly at Huntsville, Alabama, in the practice of his profession. Subsequently, migrating to Mississippi, he formed a partnership with the writer of this hasty and imperfect sketch. In about ten years he left Mississippi as an adventurer to Texas, where he was favorably received and soon placed upon the bench of her Supreme Court. He had not held this responsible and dignified position long, when an event occurred of a most disastrous character, which, for a time, subjected him to much inconvenience and suffering. He was holding court in the city of San Antonio, and was superintending the trial of an important cause, when a body of armed Mexicans, whose proximity had not been suspected, broke into the court-house, and carried off the judge and several others



who were in attendance upon the court, to the Castle of Perote, where they were for some months kept in a state of close incarceration. Through the friendly interposition of the American Minister near the Mexican capitol, the late Waddy Thompson, Judge Hutchinson was at last released from imprisonment, when he returned to the state of Mississippi, and again engaged in the practice of law, becoming once more my co-partner in business. He died in the year 1853, beloved and respected by all who knew him. Judge Hutchinson did not at all excel as a speaker; but he was a deeply read lawyer, possessed a sound and vigorous intellect, and was the most industrious, persevering, and skillful office lawyer I have ever known. He was a man of the greatest simplicity of manners; credulous and confiding almost to a fault; and was universally recognized as an honest, public-spirited and patriotic citizen.

Amid that throng of meritorious attorneys whom I formerly knew as occupying elevated positions at the Mississippi bar, and who are now no longer among the living, it is impossible that I could fail to notice the Honorable Caswell R. Clifton. He, like Judge Hutchinson, had been a member of the bar in Alabama and had afterwards removed to Mississippi, where he almost immediately obtained a large and profitable practice. He was for some time a circuit court judge, and was highly approved as such; but he soon resigned this position, and joined Judge Mayes, who was at the time overwhelmed with professional business. He had, early in life, officiated as clerk of the District Court of the United States at Huntsville. When he died he was occupying the place of clerk of the High Court of Errors and Appeals. Judge Clifton was a man of extensive general reading, was possessed of much legal learning, had much success in early life as a chaste, pointed and entertaining political writer, and was admirably qualified to command respect and secure numerous friends in social life.

General John A. Quitman is familiarly known by character to every intelligent freeman in America. He was a brilliant and meritorious actor in the late Mexican war, was at one

time chancellor of the state of Mississippi; at a subsequent period of life he became governor of that state, and represented for several years one of her congressional districts in the national house of representatives. He is said to have been educated for the ministry; but not having much relish for that vocation, he studied law, and located in the city of Natchez about the year 1822. General Quitman's legal attainments were respectable, his scholarship quite considerable, and his general reading by no means contemptible. He was a ready and vigorous writer, but was singularly deficient in rhetorical energy and grace. He was a courageous and high-minded gentleman, and left behind him numerous friends and admirers.

Major William A. Lake, for many years a prominent member of the Mississippi bar, was a native of Maryland. He was a man of most majestic person, of polished and agreeable manners, and very extensively loved and respected. His standing at the bar was highly reputable, his personal popularity unsurpassed, and his untimely death, upon the field of honor, was universally regretted in the community where he had so long lived in the practice of every social and domestic virtue. It may be truly said of this amiable and accomplished man, that though proud and sensitive in his feelings, he was not at all irritable or petulant; and, though assiduous in maintaining his own dignity, he was never in the least degree arrogant or overbearing in his demeanor towards others.

Patrick H. Tompkins first saw the light in the state of Kentucky, where he was occupied in the practice of law for some years before he was attracted to a region where he was destined soon to rise to distinction, and to run a very brilliant career, both as an attorney and politician. The scholastic attainments of Mr. Tompkins were by no means extensive; his knowledge of law not much above what is usual at the bar; but he was richly endowed by nature, and well qualified by reason of his energy and close application to whatever he undertook, to obtain patronage as an attorney, and to acquire prominence as a party leader in bustling and exciting times. He was wonderfully ready as a speaker; reasoned upon or-

dinary facts with much astuteness and ingenuity, exhibited on all occasions a rich fund of humor, and bore along with him perpetually a weighty budget of apt and telling anecdotes, which he related in a manner often irresistibly comical. He appeared in many well-remembered criminal trials with great credit whilst he remained in Mississippi, and as a political debater, had few, if any superiors in the state. He served in Congress for several years, and upon the acquisition of California, removed to the city of San Francisco, where in a year or two he died.

Though, in performing the task in which I am now engaged, I have deemed it prudent to avoid, as far as practicable, the mention of individuals, however meritorious and distinguished they may be, who are yet living, I am tempted to make an exception to this rule in the case of the interesting individual now about to be mentioned.

Colonel Horace H. Miller was known to me very familiarly in the city of Vicksburg, some twenty-five years ago, as a young gentleman of much intellectual promise, and of many noble traits of character. He was then the editor of a newspaper of considerable circulation and of quite an extended influence. He was a zealous supporter of the Union in the memorable political struggle of that period, and gained much reputation as a manly, energetic, and judicious political writer. As a reward for his valuable patriotic services, President Fillmore, at my instance, conferred upon him an important diplomatic appointment, the duties of which he is known to have discharged with eminent credit. When he returned from abroad, Colonel Miller returned to the practice of the law, in which I rejoice to learn that his success has been equal to his merits.

Should I live twenty years longer, there are able and learned attorneys yet residing in Mississippi, who, should they have left the scenes of earth in advance of me, I shall take pleasure in delineating for the benefit of future generations; and I shall be especially encouraged to the performance of this task by the continued successful publication of the SOUTHERN LAW REVIEW, providing its editor of that period shall be

willing to aid me in preserving the materials needful for the preparation, by some more gifted pen, of a regular and complete History of the Bench and Bar of the South and Southwest.

In bringing this article to a close, I hope to be excused for the remarks which I deem it proper here to subjoin. At different stages of my own somewhat active career as a public man, I have been brought into contact, of a more or less familiar character, with a large majority of the lawyers who have been residents of Mississippi during the last forty-five years. It has been my fortune likewise to traverse, at different periods, most of the states and territories comprised within the limits of this wide-spread Republic; and I now take pleasure in averring that I know of no region where the members of the bar, as a class, have shown themselves entitled to more consideration and respect than those of the yet loved and honored commonwealth in which my own days of early manhood were spent, and where I have been formerly the recipient of honors and kindnesses far beyond any merit which I possessed. Upon the Bench of Mississippi many learned and able judges have presided in the last half century, whose recorded opinions will "stand the test of scrutiny, of talents and of time;" and among the servitors of the Forum there has ever prevailed in this once prosperous but now unhappy state, a nice and delicate sense of professional and of personal honor, and a freedom from immoral habits and coarse incivility of manners, which would do credit to any age or country.

HENRY S. FOOTE.

NASHVILLE, TENN.

[P. S.—After the above article had been written and sent forward to the SOUTHERN LAW REVIEW for publication, a correspondence occurred between the enterprising publishers of that periodical and myself, which resulted in an arrangement for the reproduction, in a single octavo volume, sometime during the present winter or ensuing spring, under the auspices of Messrs. Soule, Thomas & Wentworth embodying what has been heretofore published over my own signature, upon the Bench and Bar of the South and Southwest, together with a considerable mass of manuscript devoted to the same subject, the greater portion of which has been already written. Should the experiment referred to prove at all successful, it is expected that several successive volumes of a like kind will make their appearance. H. S. F.]

## VII. DAMAGES FOR INJURIES RESULTING IN DEATH.

1. The Common Law Doctrine.
2. English Legislation on the Subject.
3. The New York Statute.
4. Statutes of various States. Similarity of.
5. Damages Actual and Pecuniary. Not exemplary. Nothing allowed for Physical or Mental Suffering.
6. Damages frequently limited by Statutes. Construction of, when not.
7. What it is Competent to Show. Expectation of Life.
8. Instances.
9. Legal Right to Benefit from the Life not essential. Presumptions.
10. Value of an Annuity. Carlisle Tables.
11. Statutes have no Extra-Territorial Operation.
12. Widow. Children. Wealth of the Defendant.
13. Death of a Child. Limitation.
14. *In pari delicto*.
15. Damages in Other and Special Cases Resulting in Death.
16. Distinction between Injuries to the Person Deceased and Injuries to Others from the death. Death Instantaneous or otherwise.
17. The Statutes of Iowa.
18. Exemplary Damages under.
19. California Statute. Exemplary Damages under.
20. The Effect of a Policy on the Life of the Deceased.
21. Who Entitled to Recover.
22. Conclusions.

§ 1. *The Common Law Doctrine*.—The life of a human being must ordinarily be considered a precious boon to himself and others; but notwithstanding this, at common law, for certain technical reasons, no action could be maintained for an injury resulting in the death of a person or for losses sustained by the death. Lord Ellenborough once remarked that, "the death of a human being cannot be complained of as an injury;"\* which, to the common understanding, appears

\* Lord Ellenborough in *Baker v. Bolton*, 1 Camp. 493. See also *Carry v. Berkshire, etc.*, R. Co., 1 Cush. 475; *Hyatt v. Adams*, 16 Mich. 180; *Edon v. Lexington, etc.*, R. Co., 14 B. Mon. (Ky.) 204, (1853) 1 Hill, on Torts, 83.

strange and paradoxical. The absurdity of this doctrine was well set forth by Mr. Justice Cole, in a recent case, when he said: "At common law if one person assaulted and beat another, the person assaulted and beaten might have his action and recover damages therefor. But if the beating was so severe as to produce death, then the wrongdoer was exempt from liability to damages in a civil action."\* But in England and most of the states, it is provided by statute, that an action may be maintained by the personal representatives of the deceased, for the benefit of the widow and next of kin, or for the benefit of the estate of the deceased, for damages resulting from his death caused by the wrongful act of another.

§ 2. *English Legislation on the Subject.*—The earliest English legislation on the subject was in 1846, when by a statute known as "Lord Campbell's Act," the personal representatives of every person killed by the "wrongful act, neglect, or default" of another, and leaving a wife, husband, parent, or child, a right of action was given to recover for the damages sustained thereby. As this statute is substantially the same as those of many states of the Union that have since been adopted, we will be justified in setting out a copy of it. It is as follows:

"Sec. I. \* \* \* Whosoever the death of a person

\* *Shearman v. The Western Stage Co.*, 24 Ia. 543. See also *Ford v. Monroe*, 20 Wend. 210; *Boston, etc., v. Dana*, 1 Gray (Mass.) 83; *Drew v. The Sixth Av. R. Co.*, 26 N. Y. 49; *Donaldson v. Mississippi &c., R. Co.*, 18 Ia. 280. The case of *Baker v. Bolton*, *supra* (1808), and the opinion of Lord Ellenborough therein, has recently been severely criticised by Judge Dillon of the United States Circuit Court, as unsustained by reason, and incapable of vindication. He maintains that the doctrine it asserts is not, "deeply rooted in the common law," and, "that it ought not to be followed in a state where the subject is entirely open for settlement." He further remarks that "it would be different if the rule had been settled in England by a long course of decisions made prior to the settlement of this country, as in that event the courts here would find it less difficult to receive it." *Sullivan v. Union Pacific R. Co.*, U. S. Circuit Ct. Dist. of Neb., Oct. Term, 1874; 1 *Central Law Journal*, 595. See also in support of those conclusions *Jones v. Perry*, 2 Esp. 482; *Cross v. Guthray*, 2 Root, (Conn.) 90; also discussions of the question 1 *Central Law Journal*, 590, 614, 622; 2 *Ibid.*, 12, 47, 117, 165, 722, 723.

shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death shall have been caused under such circumstances as amount in law to a felony.

"Sec. 2. Every such action shall be for the benefit of the wife, husband, parent, and child, of the person whose death shall be so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury, resulting from such death, to the parties respectively for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties, in such shares as the jury by their verdict shall find and direct."\*

§ 3. *The New York Statute.*—The New York statute provides as follows: "Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony." "Every such action shall be brought by and in the names of the personal representatives of the deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in

\* 9 and 10 Vict. ch. 93, §§ 1, 2.

every such action the jury may give such damages as they shall deem fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person; provided that every such action shall be commenced within two years after the death of such person."\*

§ 4. *Statutes of various States.*—The statutes of many of the states of the Union,† do not differ materially from the

\* N. Y. Stat. 1847, ch. 450, §§ 1, 2; as amended by Stat. 1849, ch. 256, § 1. 4 Edmond's Statutes at Large, 526.

† *Vermont.*—"Whenever the death of a person shall hereafter be caused by the wrongful act, neglect or default of any person, either natural or artificial, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person or corporation who would have been liable to such action if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount in law to a felony." (Gen. Stat. Vt. 1863, ch. 52, § 15.) "Every such action shall be brought in the name of the personal representatives of such deceased person; and the amount recovered in such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, who shall receive the same proportions as provided by law for the distribution of the personal estate of persons dying intestate." (Id. § 16.)

*New Jersey.*—"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect, or default is such as would, if death had not ensued, entitled the party injured to maintain an action and recover damages in respect thereof, then, in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony." "Every such action shall be brought by and in the names of the personal representatives of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death to wife and next of kin of such deceased per-



New York statute on this subject, except as to the amount which may be recovered, and the parties who may recover,

son; provided, that every such action shall be commenced within twelve calendar months after the death of such deceased person." (Nixon's Dig. [1868,] p. 234. §§ 1, 2.)

*North Carolina.*—"Whenever the death of a person shall be caused by the negligence or default of any railroad or steamboat company, or any steamboat or stage coach proprietor, in this state, and the neglect or default is such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, then, and in every such case, the corporation which would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured. Whenever the death of a person shall be caused by the wrongful act of another person, and the wrongful act is such as would have entitled the party injured to maintain an action and recover damages in respect thereof, if death had not ensued, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. Every such action shall be brought by and in the name of the personal representatives of the deceased, and the amount recovered shall be disposed of according to the statutes for the distribution of personal property in case of intestacy. And in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death." \* \* \* "The amount recovered in every such action shall be for the exclusive and sole benefit of the widow and issue of the deceased, in all cases where they are surviving." (N. C. Rev. Code, 1855, p. 65, ch. 1, §§ 8, 9, 10, 11. Substantially the same provisions are contained in the Rev. of 1873. See Battle's Rev. p. 414, §§ 121, 122, 123.)

*Ohio.*—"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof; then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree or manslaughter." "Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person dying intestate; and in every such action the

or for whose benefit suit may be brought. The appended note contains the provisions of the statutes of several states.

jury may give such damages as they shall deem fair and just, not exceeding five thousand dollars, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person: provided that every such action shall be commenced within two years after the death of such deceased person." (Ohio Rev. Stat. [Swan & Cr.] 1860, p. 1139, chap. 87, §§ 636, 637.)

*Illinois.*—The statute of Illinois is a substantial copy of the Ohio statutes. (Rev. 1874, p. 582; 1 Ill. Rev. St., 1858, p. 422, §§ 1, 2.)

*Michigan.*—The statute of Michigan is also a substantial copy of the Ohio statute, except the limitation of damages to \$5,000. (Compiled Laws [Dewey] 1872, p. 1881. But if the injury is by a railroad the damages are limited. Id. pp. 771, 814. Mich. Rev. St. 1857, p. 1329, ch. 515, §§ 1, 2.)

*Wisconsin.*—Sec. 12 of the Wisconsin act is the same as § 636 of the Ohio statute, except the last clause in relation to the act amounting to murder or manslaughter. Sec. 13 provides: "Every such action shall be brought by and in the name of the personal representatives of such deceased person; and the amount recovered shall belong and be paid over to the husband or widow of such deceased person if such relative survive him or her, but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants, and in every such action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relatives of the deceased specified in this section: provided every such action shall be commenced within two years after the death of such deceased person." (Rev. Statutes [Taylor] p. 1574, [1871]. Wis. Rev. Stat. 1858, p. 800, ch. 135, §§ 12, 13.)

*California.*—"When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through any opening or defective place in a side-walk, street, alley, square or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was at the time of the injury, to have kept in repair such side-walk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as under all the circumstances of the case may to them seem just." (Code of Civ. Proc. § 377, [1872].)

*Indiana.*—"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may

With the exception of the statutes of California, and perhaps Iowa, which we shall hereafter notice, the phraseology

maintain an action therefor, against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed five thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or the next of kin, to be distributed in the same manner as personal property of the deceased." (2 Ind. Rev. Stat. [Gavin & Hord], 1862, 330, § 784.)

*Oregon.*—"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person." (Oregon Code, 1862, p. 97, § 367. Gen. Laws, 1872, p. 187.)

*Missouri.*—"Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured." (Gen. Stat. Missouri, § 2, ch. 147, p. 601. Wag. Stat. p. 520.)

All damages accruing under the last preceding section shall be sued for and recovered: "First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then, by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment, or if either of them be dead, then by the survivor." \* \* \* "And in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default." (1 Wag. Stat. p. 519.)

*Minnesota.*—"When death is caused by the wrongful act or omission of any party, the personal representatives of the deceased may maintain an action, if he might have maintained an action had he lived, for an injury caused by the same act or omission; but the action shall be commenced within two years after the act or omission by which the

of the various statutes is very similar; and they are generally a substantial copy of the English model, known as "Lord Campbell's Act."

death was caused; the damage thereon cannot exceed five thousand dollars, and the amount recovered is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportions as the personal property of the deceased person." (Rev. Stat. Minnesota, 1866, p. 546, ch. 77, § 2. Biss. Stat. at Large [1873] p. 913, § 25. *Butler v. Steamboat Milwaukee*, 8 Minn. 97.)

*Kansas*.—"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter, for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." (Kansas Gen. Stat. 1868, p. 709, ch. 80, § 422.)

*Alabama*.—"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action against the latter at any time within one year thereafter, if the former could have maintained an action had he lived, against the latter for an injury for the same act or omission, had it failed to produce death. (Rev. Code Ala. 1867, § 2297.) The damages recovered in such action cannot exceed three years' income of the deceased, and in no case exceed three thousand dollars. The amount recovered is for the benefit of the widow; if there be none, then for benefit of the child or children; if there be none, then to be distributed as other personal property amongst the next of kin of the deceased." (Ibid. § 2298.)

*Mississippi*.—"Whenever the death of any person shall be caused by any such wrongful or negligent act or omission as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children, or both, or husband or father; the person, or corporation, or both, that would have been liable if death had not ensued, and the personal representatives of such person, shall be liable for damages notwithstanding the death; and the action may be brought in the name of the widow for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of a child for the death of an only parent; the damages to be for the use of such widow, husband, or child, except that in case the widow should have children, the damages shall be distributed as personal property of the husband." (Rev. Code, Miss. 1851, p. 486, § 48.)

§ 5. *Damages Actual and Pecuniary—not Exemplary.—Nothing allowed for Physical or Mental Suffering.*—In construing these statutes as well as the English act, the courts

*Iowa.*—The provisions of the Code of Iowa relating to this subject are as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission of such agents, engineers or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding." (Iowa Code, 1873, § 1307.) "All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same." (Id. § 2525.) "The right of civil remedy is not merged in a public offence, but may in all cases be enforced independently of, and in addition to the punishment of the latter. When a wrongful act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child or parent, it shall not be liable for the payment of debts." (Id. § 2526.)

*Arkansas.*—"For wrongs done to the person or property of another an action may be maintainable against the wrongdoers, and such action may be brought by the person injured, or after his death by his executor or administrator, against such wrongdoer, or after his death against his executor or administrator in the same manner and with like effect in all respects as actions founded on contracts." (Stat. of Ark. 1858, p. 120, ch. 4, § 94.)

*Louisiana.*—"Every act whatever of a man that causes damage to another, obliges him by whose fault it happened to repair it. The right of this action shall survive, in case of death, in favor of the minor children and widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death." (Rev. Stat. Louisiana, 1857, p. 79, § 18.)

*Maryland.*—"Whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death shall have been caused under such circumstances as amount in law to felony." (Code of Maryland, 1860, Art. 65, § 1, p. 449.) "Every such action shall be for the wife, husband, parent, and child of the person whose death shall have

have very uniformly held, that the damages provided for and recoverable under them, are only such as are pecuniary and actual, and not exemplary. Nor can anything be allowed as

been so caused, and shall be brought by and in the name of the state of Maryland for the use of the person entitled to damages, and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the above-named parties in such shares as the jury, by their verdict, shall find and direct" (Id. § 2.)

*Pennsylvania.*—"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the injured party during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for, and recover damages for the death thus occasioned." (Purdon's Penn. Dig. 1862, p. 754, § 2.) "The persons entitled to recover damages for an injury causing death shall be the husband, widow, children or parents of the deceased, and no other relative; and the sum recovered shall go to them, in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors." (Id. § 3.)

*Kentucky.*—"The widow and minor child or children, (or either, or any of them,) of a person killed by the careless or wanton use of firearms or other deadly weapons, not in self-defense, may have an action against the person or persons who committed the killing, and all others aiding or promoting the killing, or any one or more of them, for reparation of the injury; and in such action the jury may give vindictive damages." (Gen. Laws Ky., 1866, App. p. 681.)

*Maine.*—"Any railroad corporation by whose negligence or carelessness, or by that of its servants or agents while employed in its business, the life of any person, in the exercise of due care and diligence is lost, forfeits not less than five hundred dollars nor more than five thousand dollars to be recovered by indictment found within one year, wholly to the use of his widow, if no children; and to the children, if no widow; if both, to her and them equally; if neither, to his heirs." (Rev. Stat. Me. 1857, p. 370, ch. 51, § 42.) These provisions are also made applicable to steamboats, stage coaches and common carriers. (Id. p. 376, ch. 52, § 7.)

*New Hampshire.*—"If the life of any person not in their employment shall be lost by reason of the negligence or carelessness of their servants or agents, in this state, such proprietors shall be fined not exceeding five thousand dollars, nor less than five hundred dollars, and one-half such fine shall go to the widow, and the other half to the children

damages under these statutes, with the exceptions we have indicated, in actions by or for the benefit of the persons en-

of the deceased. If there is no child, the whole shall go to the widow; and if no widow, to his heirs, according to the law regulating the distribution of intestate estates." (Gen. Stat. N. H., 1867, p. 529, ch. 264, § 14).

*Connecticut*.—"If the life of any person, being a passenger, or crossing upon a public highway, in the exercise of reasonable care, shall be lost by reason of the negligence or carelessness of any railroad company in this state, or by the unfitness or negligence or carelessness of its servants or agents; such railroad company shall be liable to pay damages, not exceeding five thousand dollars, nor less than one thousand dollars, to the use of the executor or administrator, in an action on the case upon this statute, for the benefit of the husband, or widow and heirs of the deceased person; one moiety thereof shall go to the husband or widow, and the other to the children of the deceased; but if there shall be no children, the whole shall go to the husband or widow, and if there is no husband or widow, to the heirs according to the law regulating the distribution of intestate personal estates." (Rev. Stat. Conn., 1866, p. 202, ch. 7, § 544.) The statutes of Connecticut also provide that an action for the death of a person shall survive, notwithstanding the death results from the same injury which is the ground of the action. (Id. p. 22, § 98.) In the last codification, this statute has undergone some alteration. (Gen. Stats. Conn., 1875, p. 422, § 9; Ibid., p. 488, § 3.)

*Rhode Island*.—"If the life of any person, being a passenger in any stage coach or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroad or steamboats; or the life of any person crossing upon a public highway with reasonable care, shall be lost by reason of the negligence or carelessness of such common carrier, proprietor or proprietors, or by the unfitness or negligence or carelessness of their servants or agents, in this state, such common carriers, proprietor or proprietors, shall be liable to damages for the injury caused by the loss of life by such person, to be recovered by action on the case, for the benefit of the husband or widow and next of kin of the deceased person, one moiety thereof to go to the husband or widow and the other to go to the children of the deceased." (Gen. Stat. R. I. 1875, p. 444, ch. 176, § 16.)

*Texas*.—"If the life of any person is lost by reason of the negligence or carelessness of the proprietor or proprietors, owner, charterer, or hirer of any railroad, steamboat, stage coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, gross-negligence or carelessness of their servants or agents; and whensoever the

titled thereto, on account of the physical or mental sufferings of the deceased, or for the sorrow, suffering, or grief, of the surviving relatives, who may be entitled to recover.\* But allowance for injuries may embrace whatever may be the

death of a person may be caused by wrongful act, neglect, unskilfulness, or default, and the act, neglect, unskilfulness or default is such as would, if death had not ensued, have entitled the party injured to maintain an action for such injury, then, and in every such case, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony." (Paschal's Dig., 1866, p. 98, Art. 15, § 1.) "Every such action shall be for the sole and exclusive benefit of the surviving husband, wife, child or children, and parents of the person whose death shall have been so caused, and may be brought by such entitled parties, or any of them, and if said parties fail for three calendar months to institute suit, then it shall be the duty of the executor or administrator of the deceased, unless specially requested by all of said parties entitled, not to prosecute the same. And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the person or persons entitled under this act, or such of them as shall then be alive, in such shares as the jury shall find and direct, and shall not be liable for the debts of the deceased." (Id. § 2.)

\* *Duckworth v. Johnson*, 4 H. & N. 653; S. C., 7 Am. Law Reg. 630; *Franklin v. S. E. Railw. Co.*, 3 H. & N. 211; *Blake v. Mid. R. Co.*, 18 Q. B. 93; S. C., 83 Eng. Com. Law & Eq. 93; 10 Eng. Law & Eq. 437; *Gillard v. The Lancashire & Y. R. Co.*, 12 L. T. 356; *Penn. R. Co. v. McCloskey*, 23 Pa. St. 526; *Whitford v. Pana. R. Co.*, 23 N. Y. 465; *Canning v. Williamstown*, 1 Cush. 451; *North Penn. R. Co. v. Robinson*, 44 Pa. St. 175; *The State of Md., etc., v. The B. & O. R. Co.*, 24 Md. 84; S. C., 5 Am. Law Reg. (N. S.) 397; *Cleveland, etc., R. Co. v. Rowan*, 66 Pa. St. 393; Ill. Cent. R. Co. v. *Baches*, 55 Ill. 379; Ill. Cent. R. Co. v. *Weldon*, 52 Ill. 290; *Penn. R. Co. v. Butler*, 57 Pa. St. 335; *Chic. & N. W. R. Co. v. Swett*, 45 Ill. 197; *Chic. & Alton R. Co. v. Shannon*, 43 Ill. 338; *Penn. R. Co. v. Zebe*, 33 Pa. St. 318; *Penn. R. Co. v. Kelley*, 31 Pa. St. 372; *Penn. R. Co. v. Vandever*, 36 Pa. St. 298; *McIntyre v. The N. Y. Cent. R. Co.*, 47 Barb. 515; *Donaldson v. The Miss. & Mo. R. Co.*, 18 Ia. 280, which was a decision under the former statute of Iowa. *City of Chicago v. Major*, 18 Ill. 349; *Telfer v. The Northern R. Co.*, 1 Vroom, (30 N. J.) 188; *Quin v. Moore*, 15 N. Y. 432; *Lehman v. Brooklyn*, 29 Barb. 234; *Conant v. Griffin*, 48 Ill. 410; *Penn. R. Co. v. Henderson*, 51 Pa. St. 315.



source of pecuniary injury to the persons for whose benefit the statute was intended; and the jury have great latitude in estimating them.\* Thus it has been held that neither physical suffering and pain, nor anguish of mind, of either the deceased or those for whose benefit the statute permits a recovery, are proper elements of damages, as they are not pecuniary injuries.†

§ 6. *Damages frequently limited by Statutes.*—The damages are frequently limited, by the provisions of the statutes, to the pecuniary injury sustained. But this limitation is not contained in the English act, and is not found in all of the statutes of the states of the Union. Nevertheless, as we have seen, they have generally been construed as limiting the damages to the pecuniary injuries sustained. But these may include the pecuniary value of the life of the deceased, to those interested therein, as provided by the statute;‡ and such as arise from the loss of personal care and training, and intellectual and moral culture, which would have been received by the parties had the deceased lived.§ The general principles governing in such cases have been well stated by Comstock, J., in *Quin v. Moore*. He says: "The theory of the statute law is, that the next of kin have a pecuniary interest in the life of the person killed, and the value of this interest is the

But in some cases exemplary damages are expressly provided for by statute, and even in the absence of statutory provisions on the subject, it has been in some cases intimated, at least, that exemplary damages might be proper. *Sherman v. The West. Stage Co.*, 24 Ia. 515; *The Penn. R. Co. v. Zebe*, 33 Pa. St. 330.

\* *Penn. R. Co. v. Keller*, 67 Pa. St. 300; *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; *Duckworth, Admr., v. Johnson*, 4 H. & N. 653; *Paulmier v. Erie R. Co.*, 34 N. J. L. (5 Vroom) 151, [1870].

† *Ohio, etc. R. Co. v. Tindall*, 13 Ind. 366; *Telfer v. Northern R. Co.*, 30 N. J. L. (1 Vroom) 188; *Oldfield v. Harlem R. Co.*, 14 N. Y. 310; *Tilley v. Hudson R. R. Co.*, 29 N. Y. 252; *Donaldson v. The Mississippi, etc., R. Co.*, 18 Ia. 280. Nor can the jury consider, in an action for the death of a wife, the loss of her society, nor the plaintiff's mental suffering. *Green v. Hudson R. R. Co.* 32 Barb. 25.

‡ *Penn. R. Co. v. Keller*, 67 Pa. St. 300; *Kresler v. Smith*, 66 N. C. 154.

§ *McIntyre v. N. Y. Cent. R. Co.*, 37 N. Y. 287; 35 How. Pr. 36.

amount for which the jury are to give their verdict. Neither the personal wrong or outrage to the decedent, nor the pain and suffering he may have endured, are to be taken into the account. These would be the foundation of the action and the criterion of damages, if death had not ensued, and the injured party had brought the suit. But the claim of the administrator, and through him of the next of kin, is altogether different.\*

§ 7. *What it is Competent to show—Expectation of Life.*—

It is competent, therefore, to show the exact situation, annual earnings, habits, health, and estate of the deceased;† the profits of his labor and business; what he would have earned for the support of those entitled to recover, or for the estate, as the case may be;‡ and the probability or the reasonable expectation of the life of the deceased at the time of the injury,§ and which may be determined by reference to the "Carlisle," or other tables of recognized scientific accuracy, relating to the expectation of human life.||

§ 8. *Instances.*—Thus, under the English act, where the decedent's income survived him, his estate of £4,000 a year passing to his eldest son, subject to a jointure of £1,000 a year to his wife, and £800 a year to his eight younger children; it was held that if the death occasioned any one of the members of the family the loss of future pecuniary benefit, the jury were bound to consider such loss and give damages accordingly.¶ So in Ireland, in an action by a widow for the death of her son aged fourteen years, who had never earned any money, but whose capabilities were valued at sixpence per day, it was held that the probability that he

\* 15 N. Y. 435.

† *Sherman v. West. Stage Co.*, 24 Ia. 515.

‡ *Illinois, etc., R. Co. v. Weldon*, 52 Ill. 290.

§ *Baltimore, etc., R. Co. v. State*, 33 Md. 542, (1870).

|| *Rowley v. London, etc., R. Co.*, L. R. 8 Ex. 221; 42 L. J. R. (N. S.) Exch. 153. *David v. South West, etc., R. Co.*, 41 Ga. 223; *Donaldson v. The Mississippi, etc., R. Co.*, 18 Ia. 280.

¶ *Pym v. The Great Northern R. Co.*, 4 B. & S. 396, affirming 2 B. & S. 759; S. C., 32 L. J. (N. S.) Q. B. 377; affirming S. C. in Q. B. 31 L. J. (N. S.) 249.

would have earned more and would have devoted a part of his earnings to the support of his mother, were proper matters to be considered by the jury in estimating damages.\* So, under the statutes of Illinois, it is necessary for the administrator to show that the deceased left a widow or next of kin, who are pecuniary losers by his death. But it is immaterial who they are, or which of them is entitled to the amount recovered, or whether the one claiming to be the widow is in fact such widow or not.† And under the former statute of Iowa, which provided, "that when a wrongful act produces death, the perpetrator is civilly liable for the injury, the parties to the action shall be the same as though brought on a claim founded on contract against the wrongdoer and in favor of the estate of the deceased;"‡ it was held that the damages recovered accrued to the estate of the deceased, and not to the next of kin. Hence, the measure of damages was the pecuniary loss to the estate by reason of the death, and not the past or prospective loss of the next of kin.§ And it was further held that the jury might find such damage as the estate of the deceased suffered pecuniarily by the death, but that they should not allow anything on account of the pain and suffering of the deceased by reason of the injury before his death, nor for the grief and distress of his family on account thereof, nor for the loss of his society; and that it was proper to submit evidence to the jury showing the exact situation of the deceased, his occupation, annual earnings, health, habits and estate, as affecting the question of damages.||

\* *Condon v. The Great S. W. R. Co.*, 16 Irish L. R. (N. S.) 415.

† *Conant v. Griffin*, 48 Ill. 410, (1868). This question could not be important until the time for distribution by the administrator should arrive. *Id.* ‡ Iowa Rev., 1860, § 4111.

§ *Sherman v. The West. Stage Co.*, 24 Ia. 515. See also *Penn. R.R. Co. v. Goodman*, 62 Pa. St. 329.

|| *Donaldson v. The Miss. & Mo. R. Co.*, 18 Ia. 280. The question, "What did the deceased usually earn?" is proper as being an inquiry of importance in forming an estimate of the pecuniary loss. *McIntyre v. N. Y. Cent. R. Co.*, 37 N. Y. 287; 47 Barb. 515; 35 How. Pr. 36. In case of injury resulting in the death of a minor, the damages must be the pecuniary loss to the parents. *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 372.

§ 9. *Legal Right to Benefit from the Life not Essential.—Presumptions.*—It is not essential to the maintenance of the action that the person to be indemnified should have a *legal right* to some pecuniary benefit, which would have resulted from the continuance of the life of the decedent.\* Nor should a nonsuit be directed, if the services of the deceased might have been of some value to the next of kin, where the statute provides that a recovery may be had for their benefit.† Nor is the jury restricted to nominal damages, although there is no direct proof of pecuniary loss.‡ Nor is proof of the wages paid the deceased at the time of his injury or death, necessary to entitle the plaintiff to substantial damages, on the ground of being deprived of support and maintenance, or of the benefits of the labor or profits of the business of the deceased.§ But under the statute of Ohio it has been held, that the value of the services will not be presumed, unless the action is for the benefit of the widow and children.||

§ 10. *Value of an Annuity.—Carlisle Tables.*—In England where the deceased had been under a covenant to pay his mother an annuity of £200 during their joint lives, it was held material to know the value of such an annuity on an average life of his age; and it was held proper to determine this from the experience of life insurance companies, and to refer for this purpose to the "Carlisle Tables," which were in use among such companies, for this purpose.¶ So, it has

\* The Illinois, etc., R. Co. v. Barron, 5 Wall. 90.

† McIntyre v. New York Cent. R. Co., 43 Barb. 532; S. C. on Appeal, 37 N. Y. 287.

‡ Ihl v. Forty-Second St. etc., Co., 47 N. Y. 317. The jury may infer without proof that the services of a boy from eleven until twenty years of age were valuable to his father, and estimate that value upon their own knowledge. O'Mara v. Hud. R. R. Co., 38 N. Y. 445; Drew v. Sixth Av. R. Co., 26 ib. 49; Oldfield v. New York, etc., R. Co., 14 ib. 310; Penn. R. Co. v. McCloskey, 23 Pa. St. 526; Penn. R. Co. v. Bantom, 54 Pa. St. 495. § Baltimore, etc., R. Co. v. State, etc., 24 Md. 271.

|| Admr. of Donahue v. The Ohio, etc., L. & T. Co., 1 Disney, 257. See also Lucas v. New York Cent. R. Co., 32 Barb. 25.

¶ Rowley v. London, etc., R. Co., L. R. 8 Ex. 221 L. J. R. (N. S.) 42 Exch. 153. See also David v. S. W. R. Co., 41 Ga. 223; Baltimore, etc., R. Co. v. State, 33 Maryland, 542; Donaldson v. Miss. & Mo. R. Co., 18 Ia. 280.

been held that, as the damages in these cases are confined to the pecuniary loss, it is erroneous to leave the amount to the uncontrolled discretion of the jury; but that it is not error for the court, after laying down the law, to tell the jury that much is left to their sound discretion in assessing the amount of damages.\*

§ 11. *The Statutes have no Extra-territorial Operation.*—These statutes have no extra-territorial operation, and do not apply where the suit is brought in one state for an injury done in another state, or in a foreign country, or on the high seas; and no recovery can be had in such cases, unless it is alleged and proved that the law of the place where the tort was committed is the same in this respect as the law of the forum.†

§ 12. *Widow—Children—Wealth of the Defendant.*—In Massachusetts, under the statute of that state, it has been held, in an action by a widow for her husband's death, that the fact that she had children dependent upon her, did not go to enhance damages.‡ And in all such cases evidence of the defendant's wealth is inadmissible.§

§ 13. *Death of a Child.—Limitation.*—In an action for damages for an injury resulting in the death of a minor child, the parents may recover the pecuniary value of the child's services during his minority, together with the expenses of care and attention, medical attendance, etc., during his dis-

\* Penn. R. Co. v. Ogier, 35 Penn. St. 60; Penn. R. Co. v. Vandever, 36 Penn. St. 298.

† Whitford v. Panama R. Co., 23 N. Y. 465; Maher v. Norwich, etc., Trans. Co., 45 Barb. 226; Selma, etc., R. Co. v. Lacy, 43 Ga. 461, (1871); Nashville, etc., R. Co. v. Elkin, 6 Coldw. (Tenn.) 582. Nor can the husband, under the laws of Georgia, recover damages for the homicide of his wife. Georgia R. Co. v. Wynn, 42 Ga. 331. The right to recover damages having accrued, the amount of the recovery cannot afterwards be limited by act of the legislature. Kay v. Penn. R. Co., 65 Pa. St. 269.

‡ Shaw v. Boston, etc., R. Co., 8 Gray, 45.

§ Conant v. Griffin, 48 Ill. 410, in which case the wealth of the defendant was held immaterial in the measure of damages, as it could not in any manner affect the pecuniary loss.

ability in consequence of the injury.\* So, under the English act, where it appeared in an action by the father for an injury resulting in the death of his son, that the father was old and infirm, and the son young and earning good wages, and had assisted the father, and that the father had a reasonable expectation of pecuniary benefits from the continuance of the son's life, the court held that the action was maintainable.† But the prospective damages for the loss occasioned by the death of a child are usually limited to the period of minority.‡

§ 14. *In Pari Delicto*.—It was held in Georgia, that the courts of that state could not, since the re-establishment of the national authority, entertain an action for the recovery of damages from a railroad company, for negligently causing the death of the plaintiff's husband, where the casualty occurred while the company was transporting the decedent, *as an officer in the Confederate service*, for hire, and was paid by the Confederate government, on the ground that the employees of the company and the decedent were, while engaged in such transportation, *in pari delicto*.§

§ 15. *Damages in other and Special Cases resulting in Death*.—It is provided by statute in some of the states, that actions for personal injuries, and in others, that all actions for injuries shall survive the death of the person injured, or of the injurer. In the absence of any other provision in relation to injuries resulting in death, the representatives of

\* Penn. R. Co. v. Zebe, 33 Pa. St. 318. See also, under Ld. Campbell's Act, Condon v. The Great S. W. R. Co., 16 Irish L. R. (N. S.) 415; Peck v. Mayor of N. Y., 3 Comst. 489; Potter v. Chicago, etc., R. Co., 21 Wis. 372.

† Franklin, Adm. v. The S. E. R. Co., 3 H. & N. 211. And see Dalton v. The S. E. R. Co., 4 C. B. (N. S.) 296; 27 L. J. R. C. P. 227.

‡ Ford v. Monroe, 20 Wend. 210; State of Maryland v. Baltimore, etc., R. Co., 24 Md. 84; S. C., 5 Am. Law Reg. (N. S.) 397. But it is held, that in an action by a child for the death of the mother, there is no reason in limiting the damages for the loss of the mother's care to the minority of the child; and if the jury are persuaded that this care would have continued afterwards, they are at liberty to give damages therefor. Filley v. Hudson R. R. Co., 29 N. Y. 252.

§ Martin v. Wallace, 40 Ga. 52.

the deceased can recover in such cases whatever the deceased might have recovered at the time of his death. Thus, in Massachusetts, where such a statute exists, and where it appeared that the defendant negligently sold as and for the tincture of rhubarb, a harmless medicine, two ounces of laudanum, a dangerous and deadly poison, to a party who procured it for the purpose of administering it as a medicine to his servant, the plaintiff's intestate, and which was administered to him, and from the effects of which he died; it was held, that the defendant was liable for the tort without regard to the question of privity of contract between them.\* So in Michigan it was held, under such a statute, that the husband may maintain an action for the loss of his wife's services, caused by the defendant's malpractice, notwithstanding the injury resulted in death; but that the damages should be limited to the loss of service between the time of the injury and death.† But under the provisions of the Massachusetts statute, it was held that no action lies where the death is instantaneous, on the ground that no action ever accrued to the decedent, and none consequently could survive.‡ And the same doctrine was held under the statute of Tennessee.§ But in Connecticut,

\* Norton v. Sewall, 106 Mass. 143. See also Davidson v. Nichols, 11 Allen, 514; McDonald v. Snelling, 14 Allen, 290. Wellington v. Downer Oil Co., 104 Mass. 64.

† Hyatt v. Adams, 16 Mich. 180.

‡ Kearney v. Boston, etc., R. Co., 9 Cush. 108.

§ Louisville & Nashville R. Co. v. Burke, 6 Coldw. (Tenn.) 45. *The Massachusetts Statute*, was as follows: "The action of trespass on the case for damage to the person, shall hereafter survive, so that in the event of the death of any person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against his executor or administrator, in the same manner as if he were living." (Act 1842, c. 89, § 1.) *The Tennessee Statute* under which the action in the foregoing case of *The Louisville & Nashville R. Co. v. Burke* was based, is as follows: "The right of action, which a person who dies from injuries received from another, or whose death is caused by the wrongful act or omission of another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death; but shall pass to his personal representatives for the benefit of his widow and next of kin, free from the claims of his

under a similar statute, it was held that though the death was instantaneous, an action could be maintained, and the court declared the decision in *Kearney v. The Boston & Worcester R. Co.*,\* "nice and technical."† And in Massachusetts, where the decedent survived but a few hours, though unconscious, it was held that the action could be maintained.‡

creditors." (2 Thompson & Steger's Tenn. Stat., 1872, § 2291.) The Tennessee statutes also provide certain precautions to be observed by railroad companies, and, "every railroad company that fails to observe these precautions, or cause them to be observed by its agents or servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur. No railroad company that observes or causes to be observed these precautions shall be responsible for any damages done to person or property on its road. The proof that it has observed said precautions shall be upon the company." 1 Id. §§ 1167, 1168. \* *Supra*.

† *Murphy v. New York, etc., R. Co.*, 30 Conn. 184.

‡ *Hollenbeck v. Berkshire R. Co.*, 9 Cush. 478.

*The statutes of Kentucky* provide as follows: "No right of action for personal injury, or injury to real or personal estate shall cease or die with the person injuring or the person injured, except actions for assault and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for personal injury; but for any injury other than those excepted, an action may be brought or revived by the personal representatives, or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract." In a recent case in the supreme court of that state, where a construction of this statute was involved, it was held that, although, where the death was instantaneous there could be no recovery, yet in cases not embraced within the exceptions of the statute, if there is an appreciable interval between the infliction of the injury and the death, the personal representative of the decedent may recover damages for the injury. The petition alleged that the defendants were druggists, and that their prescription clerk, in attempting to fill a physician's prescription, through gross and culpable negligence, put up croton oil instead of linseed oil, which oil was, in consequence of such mistake, administered to the plaintiff's intestate, and that it caused him great suffering and agony, and did him serious and irreparable injury, and was the immediate cause of his death on the same day. It was held that this petition stated a good cause of action. The court say: "Whilst we hold that in order to authorize a recovery in such cases, there must be an appreciable interval between the infliction of the injury and the death, and that no recovery can be



§ 16. *Distinction between Injuries to the Person of the Deceased and Injuries to Others from the Death.—Death Instantaneous.*—It may be observed that the statute which continues and keeps alive a cause of action for an injury in case of the death of a party therefrom, has no reference to those damages resulting to third parties from injuries that produce death. We have already considered the damages under statutes providing for damages in the latter case, which do not necessarily include damages such as deceased might himself have recovered, or been entitled to, at the time of his decease. It would, of course, be competent for the legislature to give a remedy to the representatives of the deceased, not only for the damages which the deceased might have recovered, but also for such damages as the widow, husband, or next of kin may have sustained by reason of the death of the injured party. If the statute provides that all rights of action shall survive, and also that the representatives of the deceased may recover all pecuniary losses sustained by the wrongful act, neglect, or default of another which results in death, then the representatives may recover, under such circumstances, not only the damages the deceased might have been entitled to at the time of his decease, but also all such damages as the heirs or next of kin of the deceased, according to the provisions of the statute, may have sustained by the death. There is an essential distinction between the two causes of action. Both rest upon statutory provisions; and there is nothing inconsistent in a recovery for both by the same party or parties, whenever the statute authorizes it.\*

It may be further observed in reference to the doctrine that had where the death is practically instantaneous or immediate, we think the petition in this case shows that between the time the poison was administered and the moment at which the death occurred, there was an appreciable interval of time, during which the intestate endured 'great suffering and agony.' For such suffering and agony the appellant is entitled to recover just what the intestate could have recovered, if he had survived and had obtained perfect and permanent relief at the moment of his death." *Hansford v. Payne*, 2 Cent. L. J. 722.

\* See S. & R. on Neg., § 611, and notes 4 & 5. See *infra*, § 17, where it is apparent that such are the provisions of the Iowa statutes.

where the death is instantaneous no recovery can be had, that in nearly, if not every case, there is an appreciable time between the injury which causes the death and the entire decease of the injured party. It would, perhaps, be impossible to cause death by any act that would not leave at least a very limited time between the injury and the death. The mere length of time should not affect the right. Whether it is one second or one hour can not be material.

§ 17. *The Statutes of Iowa.*—The present statutes of Iowa, on this subject, are unlike most of the statutes of the various states.\* They do not expressly provide for damages to the parties designated therein, for the death of any person injured, as most of the statutes do. They only provide that "all causes of action shall survive;" "that when a wrongful act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased," \* \* and that "every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." The supreme court of that state has given its construction to the latter statute, by construing the act from which a portion of it was derived,† so far as to hold that the words, "shall be liable for all damages sustained by any person," includes a party who sustains a damage by the death of the party injured, and that the representatives of the deceased may recover damages therefor.‡

\* See the statutes set out at length, *ante*, p. 711, note.

† Acts 9th Gen. Assem. Iowa, ch. 169, § 8.

‡ *Philo v. The Illinois Cent. R. Co.*, 33 Ia. 47; where Beck, J., in delivering the opinion of the court, remarks: "That the intention of the legislature, in the enactment of the statute, accords with its language,

§ 18. *Exemplary Damages under the Iowa Statutes.*—Under the Iowa statutes there would appear to be no reason why the administrator of the deceased may not only recover such damages as the deceased was entitled to at his death, includ-

there can be no doubt. It cannot be presumed that the law-makers would secure to employees of railroads, a remedy for injuries, not resulting in death, but for the greater injuries whereby life is destroyed they would make no provision; thus securing to the employee himself compensation for the lesser injury, but denying to his family, who are dependent upon him for support, compensation for the loss they sustain in his death."

With due deference to the court, in its construction of the statute, we cannot resist a different conclusion. The question is not what the legislature ought to have done, but what was intended, as derived from the language, and the evident purposes they had in view. The statute already provided that causes of action should survive. It might as well be assumed that as this provision secured to the representatives of the employees of railroads who might die of injuries received, caused by the negligence of the corporation, a right of action for such damages as deceased might have recovered at the time of his death, and that it was unreasonable to suppose the legislature, in the enactment of this statute did not intend to secure to the representative, the remote damages also, resulting from the death, to third parties. The language of the statute, making railroad corporations liable is such as we may well suppose the legislature would use if they intended to limit the damages to the party injured. No mention is made of damages resulting from the death of a party by reason of injuries received, which we find in all the statutes relating to this subject, where it is designed to give damages for the death of a party.

Aside from any purpose to extend the liability of railroad corporations to damages to third parties, resulting from the death of another, it is reasonable to infer that their purpose, from the language of the act, was to make such corporations liable for even the wilful acts of their agents and employees, and this would appear sufficient to require such a statute, and to call for the legislative attention which it received.

Under the statutes of Kentucky and Connecticut, it seems that the plaintiff may recover such damages as the deceased might have recovered, if death had not ensued. Thus, in an action in the former state by the personal representatives of one killed by the fault of a railroad company, he may recover not only such actual damages as the deceased might have recovered, but also exemplary damages. *Bowler v. Lane*, 3 Met. (Ky.) 311; *Chiles v. Drake*, 2 id. 146. See also in Connecticut, *Goodsell v. Hartford, etc., R. Co.*, 33 Conn. 51; *Murphy v. N. Y. & N. H. R. Co.*, 29 Conn. 496.

ing exemplary damages, but also, under the construction given to the act relating to railroad companies, as we have seen, all such damages as result to the estate by reason of the death. Whatever right the deceased had at his death to recover damages, succeeds to the administrator of his estate, the damages to "be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts." It seems, therefore, to follow, on general principles, that where the administrator seeks to recover for such damages as the deceased was, at his death, entitled to, and also for the damages sustained to the estate by reason of his death, he would also be entitled to recover exemplary damages for an injury to the deceased, whenever he could have recovered the same, had he lived.\*

§ 19. *California Statute.—Exemplary Damages under.*—It will be observed that the California act expressly provides for exemplary damages. And under this act, it has been recently held that the jury may give exemplary damages for the death of an infant caused by the negligence of the defendant."† But this statute and the Iowa statute are exceptions in this respect to the statutes generally on this subject; and in the construction of those modeled from the English act, as we have noticed, whether the acts expressly provide for the pecuniary damages sustained or not, it has generally been held, that the damages should only embrace such injuries as are of a pecuniary nature.

§ 20. *The Effect of a Policy on the Life of the Deceased.*—On the question whether the amount of the recovery can be affected under the English act, and those substantially like it, by money received by the person for whose benefit the suit is brought, or by the estate of the deceased, on a policy of insurance on the life of the deceased, there has been some diversity of decision. On the one hand, Lord Campbell, the author of the English act, held that it should be taken into

\* *Sherman v. The Western Stage Co.*, 24 Ia. 515, where it was held that the damages were the pecuniary loss to the estate.

† *Myers v. San Francisco*, 42 Cal. 215, (1871.)

account in assessing damages, and deducted from the amount of the pecuniary loss.\* While, on the other hand, in this country it has been held otherwise.†

§ 21. *Who entitled to recover.*—Under the English act, and the statutes of the various states copied in substance from it, the right to recover is based upon the death of the party, and the pecuniary loss thereby sustained by the wife, husband, parent, child, or the estate. And where the executor or administrator of the deceased is authorized or required to sue therefor, he is a mere nominal party, who sues for the benefit of the parties named in the statute, or the estate. And if for the benefit of several parties, they should severally be awarded damages proportioned to the injury resulting to each from the death.‡ Thus, if the victim of the wrongful act, neglect, or default of another, who dies in consequence thereof, leaves a wife, parent, or child, and they were entitled to an annuity in different amounts dependent upon the life of the deceased, “the recovery would be in the name of the executor or administrator, but it should fix the amount going to each, and it would be proportioned to the amount of the respective annuities. The damages suffered by the estate of the deceased would have nothing to do with the amount of recovery. The measure of damages would be the pecuniary injury resulting from such death to the parties respectively, for whom and for whose benefit such action was brought.”§

§ 21. *Conclusion—Contributory Negligence.*—In conclusion it may be observed, that the general principles of the law relating to mutual or contributory negligence, are applicable to actions for injuries resulting in death, so that no action can be maintained where the negligence of the party injured

\* Hicks v. The Newport, etc., R. Co., 4 B. & S. 403. But see Bradburn v. Great W. R. Co., 44 L. J. R. (N. S.) C. P. 9. S. C., L. R. 10 Exch. 1.

† Althorf v. Wolfe, 22 N. Y. 355; Harding v. Town, 43 Vt. 536; Pittsburgh, etc., R. Co. v. Thompson, 56 Ill. 138, (1870.)

‡ Blake v. The Midland R. Co., 18 Q. B. 93; S. C. 83 E. C. L. 110,

§ Opinion of Cole, J., in Sherman v. The Western Stage Co., 24 Ia. 515, 550.

or killed materially contributes to the injury or death.\* But we have already considered this subject elsewhere. The subject of excessive damages and of setting aside verdicts, will be hereafter fully treated.

G. W. FIELD.

ANAMOSA, IOWA.

\* *Willets v. Buffalo, etc.*, R. Co., 14 Barb. 585; *Penn. etc., Co. v. Ogier*, 35 Pa. St. 60; *North Penn. R. Co. v. Robinson*, 44 Pa. St. 175.

### *VIII. LIABILITY OF RAILROAD COMPANIES FOR REMOTE FIRES.*

Whether a railroad company is to be liable for all fires of which its locomotives are the occasion, is a question so important to the industrial interests of the land, that I may be excused for giving to it in this place a more elaborate discussion than I was able to do in my treatise on Negligence. A squatter, for instance, builds, three hundred feet from a railroad, a shanty, and permits between the shanty and the railroad a mass of dry stubble to collect. This stubble is easily kindled by sparks from the locomotive, and the shanty is soon in a blaze. The same carelessness which left a lane of combustible materials from the railroad to the shanty, leaves a further lane of combustible materials to other buildings, constructed with equal recklessness, a little further on. Over this continuous line the fire races rapidly; and by this process the suburbs of a city, successive stages being in the same way accomplished, is set on fire, and finally the city itself is destroyed. The railroad company is sued for the damage, and it is held liable, and, of course, is swamped; its whole assets, when brought to the hammer, not being sufficient to satisfy the judgment. Or, to take a decided case, a manufacturing company builds a dam to supply its works with water. A heavy rain falls, and the dam is swept away. The water descends on another dam, carelessly built by other parties, and this dam also yields. Another dam, built with equal carelessness, is broken through by the tremendous accumulation of water bearing against it, and finally a valley is flooded and a group of villages submerged. The company owning the dam which first gives way is sued; and a judgment is entered against it for the whole of the final damages, although it proves that but for the carelessness with which dams number two and number three were constructed such

damages would not have ensued. The company thus sued is ruined and its operations closed by the process, just in the same way as the railroad corporation, which was the occasion of the fire in the first illustration given by me, is destroyed. Now, in both these cases the injury to the community is not terminated by the annihilation of the two corporations sued. A subsidiary injury, of no mean dimensions, is to be found in the recklessness which such procedure imparts to non-capitalists dealing with dangerous instrumentalities. If I am held to be personally responsible for the consequence of placing combustible materials by the side of a railroad, or of building inadequate dams at the base of a great manufacturing reservoir, then I will be careful not to place such combustible materials under the eaves of a locomotive engine, or to dam up water, in the trough of a natural watershed, without taking the precautions which a good mechanic, an expert in such work, is accustomed to use. But if I am not so responsible, I will build recklessly, and to this recklessness will be traceable ruin which otherwise would have been averted. The very fact that when a suit for damages is brought, I am skipped over, and the rich corporation behind me attacked, while it assures me, if I am poor, a position of irresponsibility, increases the recklessness of myself and other non-capitalists, and thus increases the risks by which the capitalist, who is alone held liable, is beset.

Capital, by this process is either destroyed, or is compelled to shrink from entering into those large operations by which the trade of a nation is built up. We are accustomed to look with apathy at the ruin of great corporations, and to say, "well enough, they have no souls, they can bear it without pain, for they have nothing in them by which pain can be felt." But no corporation can be ruined without bringing ruin to some of the noblest and most meritorious classes of the land. Those who first give the start to such corporations are men of bold and enterprising qualities, kindled, no doubt, in part by self-interest, but in part also by the delight which men of such type feel in generous schemes for the development of public resources, and the extension to new fields of



the wealth and industry of the community. Those who come in, in the second place, to lend their means to such enterprises after these enterprises appear to be reliable objects of investment, are the "bloated bond-holders," consisting of professional men of small incomes, and widows and orphans whose support is dependent on the income they draw from the modest means left to them by their friends. Nor is it these alone who are impoverished by the destruction of the corporations of which I here speak. The corporation may itself be soulless, and those investing in it may deserve little sympathy, but those whom it employs are the bone and sinew of the land. There is no railroad, no manufacturing company that does not spend three-fourths of its income in the employment of labor. When the corporation's income ceases, then the laborer is dismissed. We hear sometimes of the cruelty of the eviction of laborers from their cottages at a landlord's caprice. But there are no evictions which approach in vastness and bitterness to those which are caused by the stoppage of railway improvements or of manufacturing corporations; in few cases is there such misery to the laboring classes worked, as when one of these great institutions is closed. I think I may, therefore, safely say that the question before us relates eminently to the industrial interests. And in this sense it demands from us the most careful thought.

Stating the question before us in the concrete, it is this:

Is a railroad company liable for damages by fire, of which, through ignition from one of its locomotives, it is one of the occasions, when, between the starting of the fire by the locomotive and the damage, intervenes the negligence or malice of third parties, by which the damage is immediately caused?

Stating the question as an elementary proposition, it is this:

Is a person liable for damages of which, unintentionally, he is one of the occasions, when, between the occurrence of the occasion and the damage, intervenes the negligence or malice of third parties, by which the damage is immediately caused?

This question, it will be at once seen, opens to us the whole

doctrine of causation. What is a juridical cause? Is there a distinction between a "condition" and a "cause?" If so, and should it appear that this distinction is juridically fundamental, how does it bear on the issue before us? This question has been much agitated in other countries and in other generations than our own. Perhaps I may best illustrate it, at least in its historical relations, by adverting to a famous controversy now a century old.

On the 27th of September, 1774, died at the Vatican, Pope Clement XV., not many months after the issue of the bull *Dominus ac Redemptor noster*, suppressing the order of the Jesuits. The cause of his death has been the subject of a contention in which the doctrines we just noticed are incidentally discussed with singular acuteness and persistency. On the one side, we are pointed to the advanced age of Ganganelli, the secular name by which Clement XV. is best known; his habits of gastronomic indulgence; the similarity of his disease with those usually produced by over-eating; and in particular to a suspiciously excessive dinner he swallowed shortly before his final attack. On the other side, it is argued that while the dyspepsia which he suffered was the *occasion*, it was not the *cause* of his death; that his constitution was such that he could have withstood this particular disease for years without succumbing; that the disease was accelerated by a subtle poison administered to him, by which its symptoms were aggravated and made fatal, and that the traces of this poison were detected in his remains. But even supposing that the latter statements are correct, are we to speak of such poison, supposing it to have been negligently given, or supposing it to be part of remedies honestly prescribed by Ganganelli's physicians, as causing his death? Was not that death caused equally by other antecedents in his eventful life? As threads in this cord of causation, are we not to enumerate hereditary infirmities which we can well suppose him to have received from his parents, and the enervating influence of a secluded ecclesiasticism, and the anxieties of the papacy at an era so critical, and that innumerable series of agencies which had united, for several generations,

in bringing Christendom face to face with the revolutions which were then about to convulse the world?

I have introduced this illustration because it gives, in a concrete shape, a case supposed by Mr. Mill,\* when advancing the theory of causation which is the basis of the adjudications which I here contest. "For every event," so says Mr. Mill, "there exists some combination of objects or events, some given concurrence of circumstances, positive and negative, the occurrence of which will always be followed by that phenomenon. We may not have found out what this concurrence of circumstances may be; but we never doubt that there is such a one, and that it never occurs without having the phenomenon in question as its effect or consequence. \* \* It is seldom, if ever, between a consequent and one single antecedent that this invariable sequence subsists. It is usually between a consequent and the sum of several antecedents; the concurrence of all of them being requisite to produce, that is, to be certain of being followed by the consequent. In such cases it is very common to single out one only of the antecedents under the denomination of cause, calling the others merely conditions. Thus, if a man eats of a particular dish and dies in consequence, that is, would not have died if he had not eaten of it, people would be apt to say that eating of that dish was the cause of his death. There needs not, however, be any invariable connection between the eating of the dish and death; but there certainly is, among the circumstances which took place, *some combination or other upon which death is invariably consequent*; as, for instance, the act of eating of the dish, combined with a particular bodily constitution, a particular state of present health, and, perhaps, even a certain state of the atmosphere; the whole of which circumstances, perhaps, constituted in this particular case the conditions of the phenomenon, or, in other words, the set of antecedents which determined it, and but for which it would not have happened. The real cause is the whole of these antecedents; and we have, philosophically speaking, no right to give the name of cause to one of them, exclusively of the others."

\* 1 Mill's Logic, 2d Lond. Ed. 398.

The first and more technical objection to this theory is, that it is logically defective in making everything the cause of everything else. Thus, in the case of Ganganelli, there is not an event in prior or cotemporaneous history of which we can safely say that in no way it entered into the combination of occurrences on which his death was consequent. Thus, to begin with one of the most obvious, it is clear that if his father, an accomplished physician of Arcangelo, possessed of peculiar ecclesiastical influence, had not lived, or had not lived at Arcangelo, or had not possessed at Arcangelo the influence just noticed, his son either would not have lived at all, or would not have been educated at Arcangelo under circumstances so favorable to his subsequent success, or would not have obtained those early ecclesiastical appointments which were the stepping stones to the papacy. So we have to suppose a line of ancestors from his father back, a change as to the conditions of either of whom would have prevented, if not the existence, at least the ecclesiastical education and promotion of the pontiff. But this is not all. The bull *Dominus ac Redemptor noster*, to take up a single line of enquiry, was one of the antecedents of the death; but what were the antecedents of the bull *Dominus ac Redemptor noster*? When we look even at those antecedents alone by which that famous bull was qualified, our field of observation expands until not only all the events of cotemporaneous Christendom are introduced, but all prior events by which Christianity was established or modified. What immediately produced the bull *Dominus ac Redemptor noster*? As we search for its immediate antecedents, we notice Joseph II. visiting Rome in person, in order, under motives of philosophical liberalism, to obtain the election of an anti-Jesuit pope, and then vehemently urging on Ganganelli, as the pope-elect, decisive anti-Jesuit action; and with Joseph II. we observe the Spanish and French Bourbons, under the influence of court intrigues, operating to promote the same object; and with them co-operates Gallicanism, jealous of whatever conflicts with the prerogatives of a national episcopate, and Jansenism not merely instinct with retributive vengeance on its old adversary, but implaca-

bly hostile to whatever militated against the Augustinian doctrine of grace. But what were the antecedents of Joseph II., and of French and Spanish Bourbonism, then in their corrupt decline, and of Jansenism, and of Jesuitism itself? Must we not, on this view, declare of the death of Ganganelli, as was declared by Fichte of the grain of sand, that he noticed on a shell on the sea beach, that the laws of the whole universe must be reversed in order to place that grain of sand elsewhere? \* May we not even ask, with Fichte, whom Mill in this respect follows, whether, in order to carry this grain of sand a few yards further, some one particular yet necessary ancestor of ours may not have perished from hunger, or cold, or heat; and thus all that his descendants might do or hope to do, to have been hindered so that a grain of sand might lie in a different place? It is true that the reply at once arises that as a child's hand could have moved this grain of sand from the beach to the shell, so an assassin's stealthy purpose could have interrupted ordinary physical laws, and, in spite of all his antecedents, caused the pontiff's death. But this, according to the philosophy we here examine, would not change the fact that the assassin with his poison is only a co-ordinate figure in the interminable range of antecedents by which the death in question is equally caused. This death, in fact on this theory, forms part of a combination of events, each of which is dependent on the other, and neither of which can exist without the other. In this respect it is again, on this showing, like Fichte's grain of sand, which is put where it is by the equilibrium of the universe, and yet from which the equilibrium of the universe results. The localization of the ancestor, on Fichte's hypothesis, is as essential to the existence of the grain of sand, as the localization of the grain of sand to the existence of the ancestor. Hence, we have the grain of sand and the ancestor part causes of each other; and each, therefore, is part cause of itself. Each event, in other words, according to such a theory of causation, becomes part cause of its own causes, and contributes to create

\* Fichte, *die Bestimmung des Menschen*, Werke ii. 178; cited by Mansell, *Aids to Faith*, p. 26.

that by which it was created. We are baffled, therefore, when we seek for causation on this hypothesis, either by being turned back to antecedents which, as unconditioned by time or space, are beyond our cognition; or which are each other's causes, which is absurd.

I said there was a second reason for my taking Ganganelli's death to illustrate Mr. Mill's notions of causality. The first reason is, that Mr. Mill suggests this death himself. The second is, that it enables me to bring to bear on this topic the Roman law, which was that, to pursue the analogy in the way a similar theme is treated by Robert Browning, by the forms of which the pontiff's death was actually investigated. But there are other grounds for appealing to the Roman law to aid in the present investigation. The Roman jurists were not only great lawyers, but they were familiar with the Epicurean scheme of causation which Mr. Mill has lately reproduced. Eloquently is this hypothesis discussed by Cicero; and two, at least, among the Justinian jurists, are referred to by Cicero as masters in the science of jurisprudence in its wide sense. But we have not to content ourselves with mere inferential proof such as this. Ulpian is the most copious writer cited in the digest; and at the very beginning Ulpian takes pains to show us that Greek philosophy has been cautiously weighed by him, in the reaching of judicial results. If, therefore, we are to look for an adequate tribunal to determine what is causality, as a practical question, and in the only shape in which the enquiry can become useful to us, we may well find this tribunal in a court governed by the principles of the Roman law.

"What killed Ganganelli?" We can conceive such an enquiry as this to be instituted before a Roman court of initiatory process, a court exercising functions similar to those of one of our own committing magistrates. "What killed Ganganelli?" In the days of Ganganelli, as well as in the days of Justinian, and in our own days, epicureanism and stoicism each had their votaries; and it is not difficult to imagine epicurean philosophers, who anticipated Mr. Mill in one part of his speculations, and stoical philosophers, who anticipated

him in another, as among the witnesses of the pontiff's death. An epicurean cook, or chief of the kitchen, would not have been an unnatural inmate of the pontifical household; and stoical physicians were not likely, in those days, to have been unknown in such a court. We can, therefore, readily conceive of an examination such as the following :

*Judge*—What, to your knowledge, was the cause of the Pope's death ?

*Epicurean Cook*—The "sum of all his antecedents;" this is the only kind of causation which philosophy can possibly know.

*Judge*—(Supposing him not to lose his temper at the answer.) But you presided over the Pope's kitchen the day of his death; was there anything that went to him different from his usual diet? Anything to cause indigestion?

*Witness*—Everything caused everything. Indigestion, if it existed, can not be said to be caused by the Pope eating a particular dish. It was *caused*, as the philosophers tell us, by the dish, and the Pope's own constitution, and the constitutions of his ancestors, and the particular state of the atmosphere by which he was surrounded, and the particular states of prior atmospheres by which this particular subsequent atmosphere was produced, and —

*Judge*—But stop. You are here to answer a particular question, and that question you must answer now, or go to prison until you do. You and I have nothing to do with these events you call the "sum of all the antecedents." You saw the food sent to the Pope. Was there anything in it by which his death might have been caused?

Or suppose the question to be put to the surgeons who examined the Pope's remains, What caused his death? And suppose a similar answer to have been made. What other reply can we conceive of than this :

"You are bound to tell which of these innumerable antecedents, of which you speak, was *the* cause; the only cause which public justice can deal with, and which public safety demands."

Nor is the reasoning of our Anglo-American courts differ-

ent in result, though it is couched in less philosophical terms than those by which, as we will presently see, the conclusions of the Roman jurists are defended. Thus, in Stokes' case, a case where every possible defence that ingenuity could devise and audacity propose, was offered, judge after judge, herein following a uniform line of unassailable adjudications, scouted at the idea that Fisk's "constitution" or other "antecedents" had anything whatever to do with the case, except so far as those antecedents tended to show Stokes that he was about to be attacked by Fisk; and it was even ruled that so close and immediate an antecedent as the probing of the wound by the surgeons was irrelevant, unless it should be proved that the probing itself was such as to have produced, as a regular and ordinary inference, the death of Fisk. So in York's case, famous in the annals of Massachusetts jurisprudence, and in Flanagan's case,\* reported in the fifty-second volume of the reports of the New York Court of Appeals, the highest courts in Massachusetts and New York, following herein the leadings of all other Anglo-American courts who have discussed the question, dismiss with summary curtness the suggestion that the defendant was in a condition of mind to be necessitated by circumstances to do a particular thing. Sane or insane, there is no one, it is held, who is necessitated to any act by "the sum of all his antecedents."

Is this barbarous? If it was the English common law alone which rules this,—a law so disdainful of metaphysics, and which metaphysics so much disdains,—the rebuke of barbarism might be treated as a natural retort. But not only the English, but the Roman law thus speaks; and the Roman law, in the person of some of its most eminent modern jurists, defends this position by reasoning which may be thus condensed:† An offence is committed, or an injury done; it is essential for us, when we come to punish the offence or redress the injury, to distinguish between those of its conditions which are mechanical and irresponsible, and those which are moral and responsible. The *cause* must be punished or

\*Flanagan v. People, 52 N. Y. 699.

†Feuerbach, *Peinliches Recht*; II. Berner, *Strafrecht*, §§ 6-22.



restrained; it must be punished or restrained because it is the *cause*. Two reasons may be given for this. The first is *absolute*; *punitur quia peccatum est*; because it follows in response to a first principle of our nature, a principle, the disregard of which would inflict incalculable injury, that retribution should follow on wrong. The second reason is that the same experience which tells us that while the stone can not be made better or worse by moral training or by fear of punishment, a man may be prevented from casting that stone at another man's head, by moral training and by fear of punishment. Hence it becomes one of the chief offices of society to discriminate between the antecedents by which an event is conditioned; and, then, for juridical and moral purposes, to cast aside such as are mechanical and irresponsible, and to select such as are moral, responsible, and capable of being moulded by law. To the latter class of conditions a further analysis is to be applied. Not every moral agent, who is the condition of an event, is to be dealt with as its cause. To make him a juridical cause, he must either design the event, and it must have resulted from his design; or, if attributable to his negligence, it must result, by the force of ordinary natural laws, directly from that negligence.

This process of analysis is one which is necessary, before any moral or juridical judgment can be expressed on any topic requiring juridical action. Here, for instance, are certain revenue frauds alleged to have been perpetrated at St. Louis. Undoubtedly there are antecedents enough, without either of which such frauds could not have been consummated. Unless there had been whiskey, there would have been no tax on whiskey, and no opportunity of fraudulently evading such tax. Had it not been for the civil war we would not have found it necessary to levy an excise; and had there been no excise there would have been no excise laws to elude. Nor can it be said that the antecedents which thus pass before us are such that their agents are necessarily non-liaible. If you adopt the doctrine of causation which I here contest, there is no person who contributed to either of these antecedents who is not a party to the St. Louis whiskey frauds.

Mr. Jefferson Davis could be indicted as one of the authors of the frauds; for Mr. Jefferson Davis was prominent in bringing about the war which led to the imposition of the whiskey tax. The few surviving advisers of Mr. Buchanan would come in as parties; for it was to their negligence that we owe that want of preparation by which the war was made so protracted and expensive. Many a government war-contractor would have to tremble in his shoes; for every dollar that was unduly or recklessly added to the debt was one of the conditions by which the whiskey tax was made necessary. Nor would it be possible, when we read General Sherman's Memoirs, and Mr. Boynton's reply, not to see that there are few among our generals whose negligence may not have contributed very largely to the same result, and whose complicity, therefore, on the theory before us, it is the duty of a court of justice to try. Where, indeed, if the "cause" of whiskey frauds is the "sum of all their antecedents," would we stop? Could we refuse to acknowledge that the love of whiskey is sometimes so maniacal a passion that the desire for its gratification is irresistible? Has not dipsomania, by materialistic philosophers who follow in the wake of Mr. Mill, been regarded as a physical disease which confers irresponsibility? Are not those who urge the passage of laws thwarting such a propensity in some part chargeable with the violation of such laws? Can we exempt, therefore, temperance crusaders from complicity in the whiskey frauds? And who but the voluntary moderate drinkers was it that stimulated the temperance crusade, if they did not directly stimulate the production of whiskey? And could whiskey have been manufactured without grain; and without grain could there have been any whiskey frauds? Who, in fact, can be relieved from prosecution in such case, if all persons who are in any way concerned in producing the conditions of the whiskey frauds are to be viewed as causing such frauds? Yet the absurdity of such reasoning is demonstrated by a mere statement of its consequences. To juridically determine responsibility we must necessarily determine between the *cause* of an event and its *conditions*. There is no opinion that can

be reached by us on any pending issue in which the discrimination which is here vindicated must not be employed. We can not act either rationally or justly without so discriminating.

But still a step further may we advance. *Ex post facto* moral judgment is as objectionable as *ex post facto* legislation. We have no right to institute a moral code for a new case, and condemn as immoral that which had not been declared immoral before. Nor can this prior announcement of immorality be made exclusively in the abstract, any more than the adjudications of our courts can be constructed simply in the abstract, without reference to the facts of any particular case. As to constitute juridical precedent there must be decisions on facts litigated at the bar of the courts, so to constitute moral precedent there must be decisions on facts litigated before the bar of public opinion. Hence, in order to justly judge cases arising now, we must justly judge cases that arose in former days; and the conclusions reached as to the cases of earlier eras go to make up the common law of morals by which future cases are to be tried. Hence it is that there is not a single prominent event in history in which, in order to dispense moral justice faithfully in future, we are not compelled to institute this very analysis of causality which Mr. Mill declares to be beyond the philosophical range. The death of Ganganelli is but one among myriads of cases in which we summon philosophy in all its departments, not merely to acquiesce in such a discrimination, but to assist in making it. What caused the death of Napoleon's prisoners at Jaffa? Is Napoleon to be charged with the atrocity of poisoning them, simply that they might not encumber his retreat? Were there any circumstances that mitigate the act, supposing it to be proved? Now, undoubtedly, the men who thus died were sick; undoubtedly the climate was unhealthy; but the whole force of our moral judgment against Napoleon consists in the conclusion that neither sickness nor climate caused these deaths, but that they were caused by the orders of Napoleon himself. What caused the lapse of Europe, after the high civilization of Rome, into the barbar-

ism of the dark ages? Was this a consequence of Christianity, or was it in spite of Christianity? And was it not traceable partly to the enervations of imperialism, partly to the incursions of those Northern hordes whom Christianity ultimately civilized? Hence we have to dismiss, before we can answer this question, those antecedents which we may regard as extraneous to the issue, such as ignorance, barbarism produced by the old despotisms, nervous reaction from the torpor of those despotisms. Now, when we are engaged in either of the three great duties which we have just successively sketched,—either in judicially determining a litigated issue, or in expressing a moral judgment on a pending measure, or in making up a common law of ethics by determining vexed questions of the past, it is mocking us to tell us that the cause, the only cause about which we care to know, the cause which we can logically reach, is the sum of all the antecedents. We demand to know which of these antecedents are mechanical and physical, not subject to moral or juridical law, and which are not mechanical and physical, and which hence are subject to moral and juridical law. We demand to know which antecedents are subjects of moral criticism and adjudication, and which are not. And as logic is the science of the discovery of truth, logic must make this discrimination for us. Any theory of logic which fails to do this is false to its mission and must be cast aside.

How, then, is causation, in its moral and juridical relations, to be defined? I know no better way than by appealing to the distinction established by Aristotle, to which the Roman jurists constantly advert. Cause, in this view, may be conceived either as material, formal, efficient or final. The *material* cause is the matter from which a thing is constructed, including the forces used in its construction. The *formal* cause is the pattern or law or archetype in accordance with which the thing in question takes shape. The *efficient* cause is the energy of change or motion by which a natural order of sequences is interrupted and a new order instituted. The *final* cause is that for the sake of which a thing is done; it is, in respect to creation, the final good designed by its

author; *το ου ενεχα και το αγαθον, causa finalis*. The two last were those with which the jurists solely concerned themselves. The last was used only for exegetical purposes. The discovery of the meaning of a statute might be helped by a consideration of the final cause the law-maker had in view. But cause, to the eye of the jurist as well as of the moralist, is mainly to be viewed in the sense given in the third of Aristotle's categories. The object of jurisprudence, as well as of ethics, is to determine what is the efficient cause of a phenomenon affecting society. Is that efficient cause a cause on which law, ethical or juridical, can properly act? If so, it must be singled out from all other conditions, so that it may be made the subject of moral and juridical action. Hence we find that *a cause*, in its juridical relations, *is such an interposition by a responsible human agent, as changes the ordinary sequence of physical laws, and produces, by its immediate and regular efficiency, the result under investigation*.\*

It will not take us long to apply the argument just given to the question of the liability of railroad companies for injuries of which they are the *occasion*, but not, in the sense of the definition just given, the *cause*. "The sum of all its antecedents, is the cause;" so says Mr. Mill; and this expression has been quoted more than once by judges who maintain that we are at liberty to single out any one antecedent that may have contributed to an injury, and then make that antecedent pay for the injury. A locomotive engine, to recur to the case with which we began, drops a spark on a mass of rubbish which the recklessness of a wood-cutter has left on a field over which the railroad company has no control. The fire thus kindled, under an unprecedentedly high wind, is whirled off some hundred feet, and a frame building, partially built, and surrounded by shavings, on the outskirts of a city, is consumed. From this building the fire readily passes to a block of houses whose owners ultimately sue the railroad for

\* NOTE.—See, for an able vindication of this definition, Bar's *Lehre vom Causalzusammenhange*. To Professor v. Bar, one of the most eminent of living jurists, I take this additional opportunity of expressing my indebtedness for the powerful reasoning contained in the treatise to which I here refer.

the damages. But, if there is only a limited range for the selection of antecedents, why not sue the owner of the frame building, who left it in such a state that it was well fitted to be a fire conductor; or why not sue the wood-cutter, who is as directly chargeable with the fire as if he had himself taken the coal from the spot on which it fell, and carried it to the shavings of the building which was first consumed? Practically, indeed, it would be answered that the wood-cutter is not to be sued because he has no money to pay the damages, and because, even if he had, not being a corporation, but being of that struggling class for which a jury's sympathies are so readily invoked, it is not sure that a verdict could be got against him at all. But theoretically, why he is not the person to be immediately called to account, it is difficult to see. He is the real incendiary. He is the one who carried, from the spot where it fell, the fire by which the block of houses was burned down. Supposing that we are to confine ourselves, in such cases, to anything like a limited liability, it is as absurd to relieve him from immediate responsibility, as it would be to pass over, in a prosecution for arson, the man who sets fire to a house with a bundle of matches which he finds in the street, in order to convict the person by whom these matches were carelessly dropped.

But, if our range of selection among antecedents is unlimited, why stop at the railroad company? The railroad company may be in fact poor. If put up for sale under a judgment, its value may be but a song; and besides this, it might be worth while to consider whether a jury might not, even for a railroad company, feel some sympathy. For, after all, it will not be merely the "bloated bondholder" who will suffer if the railroad is ruined. Thousands of operatives are mediately or immediately employed in running it, and in keeping it in repair. To its conveniences of transportation all the farmers bordering on it owe a market in which to buy and in which to sell. Even the wood-cutter who has virtually carried the coals dropped by its locomotives and by them set fire to the neighboring town,—even this laborer has an interest in the prosperity of the road; for if the road is killed

out, what becomes of the work by which his living has been made? Even the neighboring town, thus set fire to, is interested; for as the road made it, so with the road it may die. So a jury might argue; and if we are entitled to skip any antecedent we choose, why not skip the railroad company, and attack an antecedent still less likely to find friends,—the rich capitalist, for instance, who contributed to build the road, or the rich manufacturer by whom its locomotives were constructed? Ought not the capitalist, before he lent his money, to have seen to it that his money should be prudently employed, and ought he not to be treated as accessory to damages which would not have occurred but through him? And ought not the manufacturer to have refused to furnish locomotives without impervious spark fenders, and was not his negligence in this respect one of the most conspicuous conditions of the burning of the town? Why, then, not sue the rich man who lent the money, or the rich man who built the locomotives? Or, if not these, why not go back still further, until we light upon some other antecedent, still more wealthy and friendless, by whom the losses we have sustained may be made up?

This, then, leads us to the practical difficulty in the way of the theory of juridical causation which we here contest. Carry this theory logically out, and we lapse into a state of barbarism to which it is impossible to conceive of jurisprudence as giving the faintest toleration. Reckless impecuniosity is to be passed over when we are seeking for a responsible cause, and we are allowed to go back until we hit, in the line of antecedents, upon wealth that is without immediate friends. But what will be the consequences of this? Will the squatter become any more careful by discovering that, outrageous and destructive as is his carelessness, he is not to be brought for it to legal account? Are the dangerous classes to be made any the less dangerous by being thus treated as ciphers whose only value is to increase the verdict against others who, though merely remote conditions of the disaster, are selected for suit simply because they are rich? And will rich men contribute to any ventures which involve such terrible

risks? Who will put money into a railroad, or into a manufacturing corporation, if the imperfections to which such institutions are necessarily subject, are made the basis of suits for damages immediately caused, not by such imperfections, but by the negligence of irresponsible men recklessly tampering with such imperfections? The first result would be the stagnation of business by the withdrawal of capital from organizations involving such risks. A second result would be the stoppage of the wages and the consequent impoverishment of myriads of operatives, who, by these organizations are employed. Another result would be the communism which would follow from a policy which makes wealth the basis of liability; which, as soon as prudence collects money, compels distribution for the benefit of indolence; and which makes the wealth of a man the distinguishing reason why he should be cast in an action for tort. No principle pregnant with such incidents as these can we conceive of the law as tolerating, yet pregnant with these incidents is the principle that all the antecedents of an event are to be viewed as juridically its cause, and that among these antecedents we may select any one we choose for a suit.

I fall back, therefore, as the only sound solution of this problem, to that which I have just proposed, that a person whose negligence may have been one of the antecedents or conditions of an event is relieved juridically from liability, if such negligence is applied to the particular event by the intervening negligence or malice of a third party. Of course from this rule we are to except those cases in which such intervening negligence is the natural consequence of the original negligence. I may leave, for instance, a horse and wagon on a highway by the door of a large public school; and as it is my business to know that such is the case, and that the children, in playing about the school-house, may unconsciously startle the horse, then I may be liable for the injury the horse may inflict by running away. But if I negligently leave my horse and wagon in a lane where no such disturbance is probable, and if through the wild driving and noise of a "rough" tearing down the street, my horse takes fright,



then the "rough," not I, is liable for the harm. Or I may negligently permit the water in my reservoir to percolate into my neighbor's field, and for this I am liable to him; but I am not liable to a distant proprietor whom my neighbor thinks proper to inundate by digging a ditch which pours the accumulated flood down into the latter's cellar. Or, to apply this distinction to the question immediately before us, a railroad company is liable for all damage which, excluding those caused by the intervention of responsible third parties, is the the natural and immediate and regular result of fire negligently escaping from its locomotives. But it is not liable for damage which, had it not been for the negligence or malice of such intervening parties, would not have occurred.\*

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\* That causal connection, to state the conclusion just given in the abstract, is broken by the intervention of an independent responsible agent, when, without which intervention, the damage would not have existed, is a maxim of the Roman law, which, in my work on Negligence, I have had occasion to state at large. As sustaining this maxim in our own law may be cited the following cases:

Hooley v. Felton, 11 C. B. N. S. 142; Mangan v. Atherton, L. R. 1 Exch. 239; R. v. Ledger, 2 F. & F. 857; Sharp v. Powell, L. R., 7 C. P. 253; Saxton v. Bacon, 31 Vt. 540; Stevens v. Hartwell, 11 Metc. 542; Shepherd v. Chelsea, 4 Allen, 113; Richards v. Enfield, 13 Gray, 344; Perley v. R. R., 98 Mass. 414; Crain v. Petrie, 6 Hill, N. Y. 522; Ryan v. R. R., 35 N. Y. 210; Webb v. R. R., 49 N. Y. 425; S. C., 3 Lans. 453; Hofnagle v. R. R. 55 N. Y. 608; Penna. R. R. v. Kerr, 62 Penn. St. 353; Cuff v. R. R., 35 N. J. 17; State v. Rankin, 3 So. Car. 438. As conflicting directly with the conclusion reached above are to be mentioned, Fent v. R. R., 59 Ill. 351; Atchison R. R. v. Stanford, 12 Kans. 354. See Annapolis R. R. v. Gantt, 39 Md. 116; Balt. & O. R. R. v. Shipley, 39 Md. 252; Pollett v. Long, 56 N. Y. 200.

## IX. THE FEDERAL COURTS.

(NO. 2.)

*"Chaque pays a ses institutions, chaque institution ses problemes, et chaque probleme sa solution propre." De Cormenin, Droit Administratif, Introd.*

Having, in the last number of the LAW REVIEW, in which we began the examination of the above subject, adverted to certain facts, which may appear to some of our readers rather remote from the present enquiry, we deem it proper to give a brief outline of the plan we have adopted in the examination of the subject under consideration.

In order to ascertain the most efficacious manner of carrying into effect a given enterprize or undertaking, it appears proper, 1st, to survey the field on which the actors move, and to which they are limited; 2d, the powers they possess, and how they are to be used with effect; 3d, to point out the obstacles which have hitherto impeded or retarded the prompt use of them; and, 4th, and finally, to indicate the manner in which the impediments and delays may be avoided for the future.

In the last number of the REVIEW we gave a brief outline of the vast field on which the judiciary of the United States had to operate.

We now proceed to inquire into the extent of the judiciary powers granted to the federal courts; and, as the Supreme Court is the first in dignity as well as in importance, it has a just claim to our earliest attention.

The judges of all the federal courts hold their offices during good behavior, which is usually for life; since every attempt to remove a judge by impeachment has hitherto failed, although a few solitary cases may be adduced in which some of the inferior judges, apprehensive of the expensive and tedious ordeal of an impeachment, have resigned. The fed-

eral judges occupy, in consequence, a more independent position than those in the individual states, who, at stated periods, are elected by the people. There can be no doubt that where a proper selection of judges has been made in the first instance, the certainty that the occupancy of their offices depends entirely on their own conduct, and not on the caprice or ill will of some demagogues, whom they may unconsciously have offended in the discharge of their duties, is calculated to increase the purity and independence of the judicial functions. That it begets an *esprit de corps* is almost unavoidable, though, when founded upon a just appreciation of the dignity and importance of their station, it is a guarantee that they will discharge their duties to the best of their abilities.

The supreme court has original and appellate jurisdiction. The former exists only in two cases, viz: Those affecting ambassadors, other public ministers and consuls, and those in which a state is a party. The supreme court also takes cognizance of numerous other cases, when properly brought before it by appeals or writs of error.

That the government of the United States is a representative government of well defined and limited powers, will not be denied.\* Nor will it be disputed that the constitution has assigned to three different bodies, known as the legislative, executive, and judiciary departments, distinct and separate powers, without giving to either a control over the actions of the others. It is true, that inasmuch as the executive department is forever watchful of and attentive to the interests and the wants of the whole Union, and is required to communicate from time to time to the legislature, which meets only at stated intervals, such matters as are urgent and require immediate attention, the constitution has conferred on the executive the right of *veto*, which is not, as the meaning of the word would lead us to suppose, an absolute prohibition to enact the law; but simply a declaration of the executive that

\* Guizot in his work on the History and Origin of Representative Government in Europe (Vol. 1, p. 119, Paris, 1851), says, that the fundamental forms of Representative Government are three: 1st, the division of powers; 2d, election; and 3d, publicity; all of which exist in the government of the United States.

for reasons, which he assigns, he is not disposed to give it his approbation. Should the legislature differ from the executive, and two-thirds of their body adhere to their resolution to enact the law, it becomes obligatory, notwithstanding the *veto*. This appears to be the only constitutional check imposed on Congress in the exercise of its legislative functions. Congress is invested with very extensive powers, all of which are indispensable to secure the peace and prosperity of the Union. That body is likewise restricted in the exercise of its powers; but these restrictions are not very numerous, and they are in general confined to subjects, which no representative, having the least regard for the opinions and wishes of his constituents, would be tempted to violate. Indeed, it may be safely asserted that, since the constitution went into operation, no attempt, or even a proposition, has been made to infringe what was distinctly forbidden by it. The members of Congress reside among their constituents, are ordinarily men of intelligence who have studied and understand the institutions of the country, and could not be induced to advocate any enactment that would be a palpable violation of their oath to support the constitution. But if they were so disposed, would not the remonstrance of the president, to whom all laws must be submitted before they become operative, impose a sufficient check on the legislature to prevent the infraction of the constitution? Or, are we to suppose, that the president, surrounded by the ablest statesmen and legal advisers, would either connive at the infraction of the constitution, or, by his supineness or indifference, permit the act to be effected and give it his sanction? This we do not deem possible.

The constitution having thus assigned to each of the three departments, on which it has conferred the power to frame laws, to carry them into execution, and to decide all controversies properly appertaining to the judiciary, without giving to either the right of supervising or regulating the acts of the other departments, it has been frequently asked, and it is a question that recurs almost daily, when, and by what authority did the supreme court obtain the power to sit in

judgment on the acts of Congress and declare them inoperative and null, in cases where they were invoked in support of disputed rights?

It is, no doubt, true that in all representative governments, moments may occur when either the legislative, executive or judiciary department may not only attempt to exceed, but actually may exceed, its powers, and, in such an event, an authority must exist somewhere to check the aberrations and to compel the offending individual or department to retrace its steps and correct the error. But unless such power has been given in express terms, it can not be presumed that it was intended that one coördinate department should exercise such authority over the others. In such an event the question resolves itself into ascertaining from whom did the various departments derive their powers? In our government this enquiry is easily answered—from the people, *who are the sovereign*, and who will not be presumed to have parted with, or bestowed rights not conferred in express terms, and in language so plain as to prevent all discussion of the subject.

The Supreme Court of the United States has decided the question of the right to declare an act of Congress null, whenever it believes it in conflict with the constitution; and Judge Story, in his able Commentaries on the Constitution of the United States, quotes the decisions of *Marbury v. Madison*,\* and *Cohen v. Virginia*,† as conclusive on the question that the supreme court possesses this power. At § 1576, p. 381, vol. 2, note 1, he says: "The reasoning of the supreme court in *Marbury v. Madison*, on this subject, is so clear and convincing that it is deemed advisable to cite it in this place, as a corrective to those loose and extraordinary doctrines which sometimes find their way into opinions possessing official influence." At § 373, p. 264 of the first volume, the same learned judge informs us that "the point was very strongly argued and much considered in the case of *Cohens v. Virginia*," and he adds: "The whole argument as well as the judgment deserves an attentive reading." He

\* 1 Cranch, 137.

† 6 Wheat. 264.

then quotes from this case, as he had done in the preceding portions of the argument.

It is rather unfortunate for the position taken by the supreme court, and so ably supported by Judge Story, that the learned opinions of the chief justice, in *Marbury v. Madison* and *Cohens v. Virginia* were simply *obiter dicta*, not at all necessary to the decision of the causes submitted for the consideration of the court. In the first case, *Marbury* applied for a *mandamus* against Madison, secretary of state, to compel him to deliver him a commission as justice of the peace. The preliminary question raised in the cause was, whether the court had the power to grant the *mandamus*, which it decided in the negative. This, of course, put an end to the controversy. What was said in relation to the powers of the court, had the case been different, though emanating from one of the greatest legal minds that ever held an office of judge, and who has, by his numerous decisions, erected for himself, in the minds of his successors and the bar, a monument *ære perennius*, can not be regarded as authority, although it is certainly entitled to the most respectful consideration. So in the case of *Cohens v. Virginia*, the question was whether a grant by Congress to the corporation of the city of Washington to establish and draw lotteries for the benefit of some local improvements, authorized the corporation to force the sale of their tickets in states where such sales were forbidden by the local law. The argument in this case took a wide range, but the real question in dispute was as above stated, and was decided in the negative. Here, likewise, the constitutional power of the supreme court, to take cognizance of and determine whether the law on which the corporation relied, was constitutional, did not arise; because, the law itself did not confer the power on which the corporation relied.

The case of *Marbury v. Madison* was decided at the February term of 1803. During Jefferson's administration, and during the trial of Colonel Burr, President Jefferson, in writing to George Hay, the district attorney of the United States at Richmond, Va., on the 2d of June, 1807, says: "I observe that the case of *Marbury v. Madison* has been cited, and I

think it material to stop at the threshold, the citing of that cause as authority. 1. Because the judges, in the outset, disclaimed all cognizance of the case, although they then went on to say what would have been their opinion, had they had cognizance of it. This, then, was confessedly an extra-judicial opinion, and as such, of no authority."\*

In a letter to Judge Johnson, on the 12th of June, 1823, volume 4th, p. 371, in declining to examine the question whether the supreme court had advanced beyond its constitutional limits, he says: "It is the less necessary in this case, as having already been done by others with a logic and learning to which I could add nothing. On the decision of *Cohens v. The State of Virginia*, in the Supreme Court of the United States, in March, 1821, Judge Roane (presiding judge of the Court of Appeals of Virginia), under the signature of Algernon Sidney, wrote for the *Enquirer* a series of papers on the law of that case. I considered these papers maturely as they came out, and confess that they appeared to me to pulverize every word that had been delivered by Judge Marshall of the extra-judicial part of his opinion; and all was extra-judicial, except the decision that the act of Congress had not purported to give to the corporation of Washington the authority claimed by their lottery law, of controlling the laws of the states within the states themselves."

Now, it is well known that Mr. Jefferson was an able lawyer, and one of the ablest statesmen of the age in which he lived, and had profoundly studied the constitution of his country, which few men understood as thoroughly as he did. He was probably, during the last thirty years of his life, not as well versed in the technical manipulations of the law as either Marshall or Story; but as a statesman, no man in the United States was his superior, and few, if any, abroad can compare with him. He was, in many respects, in advance of the age in which he lived, and future times will pronounce his name with a veneration richly deserved by his love of his country and his unremitted efforts to place it in the front

\* Jefferson's Corresp., vol. 4, p. 75.

rank of civilization. Mr. Jefferson is clearly of opinion, and so expresses himself, that if there must be an ultimate arbiter somewhere to decide constitutional questions, which he admits, it can not be either of the departments; but it must be left to "the people of the Union assembled by their deputies in convention, at the call of Congress, or of two-thirds of the states."\*

It may appear an act of temerity on our part to attempt to question doctrines, which though frequently controverted, have been for upwards of seventy years uniformly acted on and upheld by the supreme court; but we hold with Bayle, "*that the human mind can never abdicate its freedom, and that free enquiry is allowed in all countries, at all times, and upon all subjects, and that this freedom is perpetual, permanent, and imprescriptible.*" We also believe with Judge Cooley, "that a power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances can not be allowed to sanction a clear infraction of the constitution."†

In the case under consideration it may be that the supreme court does possess the power it claims, and has continued to exercise it for nearly three-fourths of a century, and, if so, an enquiry into its foundation can do no harm, but will, if the evidence of the right claimed, and the reasoning on which it is founded, be conclusive, strengthen its pretensions.

*Prima facie*, it appears certainly not very probable that where three coördinate departments of a government have been created, equal in dignity, and each independent of the other, a fraction of the judiciary department (for the supreme court is only a portion of the judiciary), has the right to declare an act of the legislature null, and yet be without the power to enforce its judgment, if Congress should deem it erroneous.

\* *Id.*, p. 374.

† *Const. Limit.*, p. 71.



The court can enforce its judgments against the parties litigant before it; but the house of representatives and the senate, who enacted the law, and the president, who approved it, can never be summoned to the bar of that tribunal, and called upon to show the constitutionality of their acts, and as to them the court is powerless, and the law they may have declared invalid, still remains on the statute-book, and may, by the members of a future court, be declared valid. That this, which has already occurred on more than one occasion, may again happen, is highly probable, in which event the confidence in the stability of the federal legislation is greatly impaired, and the making of the law virtually entrusted to the court instead of Congress.

To show that, in spite of these anomalies, the power yet exists, may be difficult, but still, perhaps, possible; and surely, if practicable, Judges Marshall and Story are qualified to accomplish such an undertaking.

That the constitution has, in express terms, invested the supreme court with the power claimed, is not pretended; but the power is inferred as follows: "*The power of interpreting the laws involves necessarily the function to ascertain whether they are conformable to the constitution or not; and if not so conformable, to declare them void and inoperative.*"

This, we humbly conceive, is a fallacy, attributable to the use of the word interpret in an improper sense; for to interpret a law is to ascertain its exact meaning and not to declare it null and invalid. But it is further said: "As the constitution is the supreme law of the land, in a conflict between that and the laws, either of Congress, or of the states, it becomes the duty of the judiciary to follow that only which is of paramount obligation."\*

Here again we have a mode of reasoning apparently sound, but supported on fallacies both in the premises and in the conclusion. It is true that the constitution is the supreme law of the land, because it is obligatory on those who have sworn to support it, to-wit: Congress, the executive, and the judiciary departments, to which, each in its particular

\* Story Const., § 1576.

sphere, specific duties were assigned, and enumerated powers delegated. The constitution to them is a compact into which each member of the departments voluntarily entered, and which each member swore to observe the moment he accepted an office, or became a member of either department. The constitution prescribed to them and each of them what they had to do, and inasmuch as every compact or agreement may be called a law to those who have bound themselves to observe it, the word *law*, being in the sense here employed synonymous with *obligation*, is proper enough, provided the sense of it be well understood. To endeavor, therefore, to reason upon the constitution as a general law, when it was only intended to limit the functions of the different departments of the government, and prescribe their respective duties; and, after you have conferred on it an attribute, which it never possessed or was intended to possess, to deduce from it the authority to annul the acts of Congress, is so striking a violation of the rules of logic, and so manifest a fallacy of confusion, that the simple statement of the fact suffices to refute the inference.

Suppose Congress, which has the power to enact laws, should be of opinion that this authority assumed by the supreme court was an assumption of power not to be tolerated, and were to impeach the judges, they might defend themselves on the ground that if they have made a mistake, it was an error of judgment and not intention; but, we think, they would find it impossible to refer to any clause of the constitution which confers on them the power they claim. The attempt, therefore, to convert into a *paramount law* that which was exclusively intended as a specific law, or rather a limitation of their authority, and to construe it as if it gave the court a supervisory power over the legislation of Congress, can not, in our opinion, be entertained for a moment, if founded solely on the above reasoning.

But it is further said,\* "That the supreme court has constantly exercised this power of final interpretation, not only in relation to the constitution and laws of the Union, but in

\* Story Const., § 391.

relation to the state acts and state constitutions and laws, so far as they affected the constitution, the laws, and treaties of the United States." And, hence, it is inferred that the authority has been sanctioned and affirmed by the general consent of the states composing the Union. If it were so, the first enquiry would be, has the supreme court carried into practice the powers they pretend to possess? We have seen that in the case of *Marbury v. Madison* they asserted that they possessed certain powers, but that they were inapplicable to that case. This was in 1803, and from that period until 1821, no attempt was made to exercise this pretended power. In this year, in the case of *Cohens v. Virginia*, the power affirmed to exist in 1803 was reasserted, but declared inapplicable to the case. So far, the opinion of the court was a mere abstraction, having never received any practical application; and, it being as yet doubtful whether it ever could be applied, there was no motive for ventilating the question.

But in 1869, the case of *Hepburn v. Griswold*\* came before the court, in which it was decided by the court that the Legal Tender Act, in so far as applicable to the payment of notes due prior to the enactment of that law, is not warranted by the constitution. Three of the judges, Miller, Swayne and Davis dissented. Chief Justice Chase delivered the opinion of the court, and stated that Judge Grier, who had resigned when the opinion was delivered, adhered to the opinion of the majority, so that, in point of fact, the decision was by five judges against three. At the December term of the Supreme Court, 1870, the cases of *Knox v. Lee* and *Parker v. Davis*† were decided, and the decision in *Hepburn v. Griswold* overruled.

The decision in the case of *Hepburn v. Griswold* appears to be the only one in which *an act of Congress* was declared null because contrary to the constitution; and the subsequent reversal of the decision exhibits the curious fact that what five judges had deliberately determined in 1869, was declared by five judges of the same court in 1871, not to be law. This

\* 8 Wallace, 603.

† 12 Wallace, 457.

fact exhibits in a striking manner the uncertainty of the laws of the United States, which, after having received the sanction of all the departments of government, including the judiciary, may, years after they have received this solemn sanction, and served as a rule for numerous contracts and transactions, be entirely changed by a decision of a bare majority of the supreme court. Professor Emory Washburn has, in an interesting paper inserted in the July number of this REVIEW, headed "*Limitations of Judicial Power*," instituted the enquiry "whether there is no way of determining *definitely* what powers the constitution delegates to and confers upon the separate branches of the government." He appears to be of opinion, that in matters calling in question the constitutionality of a law, the decision, be it adverse or favorable, ought to be conclusive, and that the functions of the court are at an end after once determining the point. He seems to admit that the court possesses the power to determine the constitutionality, but when it has done so, it can not retrace its steps, its powers being exhausted. This opinion of the limitation of the power would be proper, if it was granted for any purpose; but until it has been determined that it actually exists, it is unnecessary to circumscribe it.

We have thus far supposed that the general assent of the people of the United States to the exercise of this power on the part of the supreme court was well founded; but in examining with care the juridical annals of the country, we have been unable to discover the existence of such general assent, and we have, on the contrary, discovered strong and most unequivocal denials of its existence from parties whose opinions are entitled to the highest respect. We have already quoted the opinion of President Jefferson, to which let us add that of President Jackson, who says: "The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on this point the president is independent of both. The authority of the supreme court must not, therefore, be permitted to control the Congress or the executive, when acting in their legislative capacities, but to have only such influence as the force

of their reasoning deserves."\* President Lincoln, while admitting that the decisions of the supreme court are binding on the parties to the suits in which they were rendered, adds: "At the same time the candid citizen must confess, that if the policy of the government upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the supreme court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."†

Professor Cooley remarks, in connection with this subject: "The boundary between *legislative* and *judicial* power is in general clear. *To declare what the law is, is the province of the latter*; to declare what it *shall be, within the limits of the constitution*, pertains to the former." And he adds, that to determine these limits, every party exercising an independent authority ought to satisfy himself that he does not overstep its bounds, etc. The powers assigned to the judiciary, by the learned professor, are vague and much too broadly stated. The power to declare what the law is appertains to the judiciary only, when it becomes necessary to decide the law applicable to the facts established in controversies which they are called upon to decide, and not to declare what the law is, except in suits of which they can take cognizance; *since to declare in general what the law is* makes them legislators, a province which, in point of fact, they too often exercise.

It is well known that Virginia and Kentucky denied the existence of the power claimed by the supreme court, and we have seen that one of the ablest judges of Virginia (Roane), in 1821, immediately after the decision in the case of *Cohens* examined critically the judgment, and to use the expression of Mr. Jefferson, appeared to him "*to pulverize every word that had been delivered by Judge Marshall.*"

A late able and conscientious lawyer, who has minutely

\* Jackson's Bank Veto, July 19, 1832.

† Story Const., 4th ed., § 375, note 1.

examined the constitution of the United States, and analyzed with great care all its provisions, and furnished all those desirous of studying this subject a most valuable and comprehensive compendium, has arrived at the conclusion that, "*The constitution has created no authoritative expounder. Every exposition has, at last, to come to the test of popular opinion.*"\*

No doubt can exist that the chief justice was fully convinced of the power of the court over which he presided to annul every legislative act, whether emanating from Congress or the state legislatures, when believed to conflict with the constitution. It was a subject on which he had deeply reflected, and it could not have escaped his attention that, during the party strifes which agitated the period of Jefferson's election, attempts might, and probably would be made to overstep the boundaries which circumscribed the authority both of Congress and the executive, and he seized the first occasion that presented itself to announce that the supreme court was final arbiter on all constitutional questions. He, unquestionably, saw clearly that such a power ought to have been provided for, and, when he discovered it was not done in express terms, he, by a course of reasoning which is plausible, convinced himself and the court, except Judge William Johnson, that they had the power.

The fallacy of the reasoning of the chief justice lies concealed in a lengthy discussion, where few persons would take the trouble to follow him. Archbishop Whately, in his treatise on Logic, under the head of fallacies, judiciously remarks, that "a very long discussion is one of the most effectual veils of fallacies." He adds: "For as in a calculation, one single figure incorrectly stated will enable us to arrive at any result whatever, though every other figure, and the whole of the operation be correct; so a single false assumption in any process of reasoning, though every other be true, will enable us to draw what conclusion we please; and the greater the number of true assumptions, the more likely it is that the false one will pass unnoticed." The word *law*, which is the word on which

\* Const. of the U. S. by George W. Paschal. Washington, 1868. Preface, p. 16.

the fallacy is founded, is a word of various significations. Webster enumerates about thirty, and everybody knows that laws may be *special* or *general*. The constitution, *viewed as a law*, directs and limits the legislative, executive and judicial powers of the general government. To divert a power, obviously intended for this sole purpose, into an authority to determine all the cases in which the constitution has been supposed to be violated, never was or could have been the intention of the framers of that instrument; for if it had been, they would have provided adequate means to carry it into effect. But the supreme court, after declaring a law void, have no power to have it effaced from the statute book.

Archbishop Whately, under the head of *law*, in the appendix to his *Logic*, points out a similar error on the part of Hooker and of Montesquieu, both celebrated writers of a past age, the former of whom is regarded as a most profound logician, and the latter as the most profound philosophical jurisconsult of the eighteenth century.

The power thus claimed by the supreme court belongs to a class recognized as the fourth power in a state by some publicists and writers on international law, who call it, *le pouvoir modérateur*, or *pouvoir conservateur*.\* This power is recognized in the *Carta constitucional* of Pedro IV, April 29, 1826, amended July 5th, 1852, in Portugal, and likewise in the Empire of Brazil, by the constitution of March 25th, 1824.† But as yet it has never been, as far as we know, incorporated into the constitutions of any of the modern republics. The power is considered as an attribute of sovereignty, and if conferred at all, must be granted by the people, the sovereigns of the United States.

If the foregoing views be correct, as we firmly believe, it will disembarass the supreme court of a fruitful source of litigation, and exempt the judges from the laborious and arduous investigations, which the examination of similar

\* *Benjamin Constant* was the first to designate this fourth power as the *pouvoir modérateur*. *Pinheiro Ferreira*, a celebrated publicist and writer on the law of nations, calls it *pouvoir conservateur*.

† *Statesman's Year Book* of 1875, by Frederick Martin. London: Macmillan & Co.

questions always impose. It will also relieve them from acting as censors on the legislative and executive departments, which, with whatever care to avoid offence it is exercised, always leaves some acrimony behind, and tends to impair the harmony which ought to prevail among coördinate departments of government, in order to secure the respect and confidence of the public.

Our object in presenting the foregoing views has been to exhibit what we believe to be the law on the subject, divested of all subtleties and brought to the test of sound reason and common sense; for we think with Cicero, "*quoniam omnia commoda nostra, jura, libertatem, salutem denique obtinemus, a legibus non recedamus.*"\*

GUSTAVUS SCHMIDT.

NEW ORLEANS, LA.

\* Pro Cluentio, § 17.



## Book Reviews.

### *I. MORGAN ON THE HISTORY, CURIOSITIES AND LAW OF LITERARY PROPERTY.\**

These are two handsome and attractive volumes, entitled by the author "The Law of Literature," whose purpose is thus stated by himself:

"Assuming, then, that the author's means of support is in the employment of the capital which he possesses in his own brain, we purpose devoting the following pages to a consideration of the means by which the law will permit him to make that capital available for the purpose. For it is the policy of the law to encourage every man to provide his own livelihood, and not to become a burden upon his neighbors, or upon the state."†

Mr. Morgan attempts no mean task, and deals with a subject possessing intense interest, when he essays a treatise on the law of Literary Property. It is not easy to agree with him in his plan of limiting his treatise to the "bread and butter" side of the subject. Property in the creations of the brain ought not to owe its right to legal protection, to either the avarice or the necessities of the owner. Nor do these volumes satisfy us that the rules of this branch of the law are so exclusively utilitarian as our author suggests. On the contrary, we find him citing at length, as a leading case, *Prince Albert v. Strange*,‡ in which the right of property of the Queen and Prince Consort of Great Britain, in etchings prepared by themselves for "their own amusement, instruction or use," was protected;§ stating that "a letter is an object of property,"|| and that "the right which every man has to the control of

\* THE LAW OF LITERATURE: Reviewing the Laws of Literary Property in Manuscripts, Books, Lectures, Dramatic and Musical Compositions, Works of Art, Newspapers, Periodicals, etc., Copyright Transfers, and Copyright and Piracy, Libel and Contempt of Court by Literary Matter, etc. With an Appendix of the American, English, French and German Statutes of Copyright. By JAMES APPLETON MORGAN, M. A., of the New York bar. In two volumes. New York: James Cockcroft & Co. 1875.

† Vol. I, p. 11.

‡ 13 Jur. 109, 2 De G. & S.

§ Vol. I, p. 399.

|| Vol. I, p. 443.

the product of his own hands (referring to letters), can hardly be discriminated against on account of the character or merit of the production ;"\*quoting with approval the concession of an English essayist that Tennyson's suppression of his early and "immature" poems is but an exercise of a legal right ;† and attributing "much reason" to Mr. Curtis' statement, that "in no case has it been considered that the author's right depends on his intention to publish and to make a profit."‡ He does not attempt, by reasoning, to sustain, against these several suggestions, his contrary theory that the law of authorship is based on its profits. But it is evident that he adheres to that theory ; for in conceding to "glory" the right to move "hand-in-hand" with "gain" in the progress of literature, he still insists that "glory" depends on "gain," and that the truest measure of the author's fame will be found in his dollars.§ From so low a stand-point, we fear no essayist can give us the most correct view of the legal rights of authors.

The plan upon which this work is constructed seems to lack system. The text of the two volumes is divided into 500 sections, which division, however, is put to no use, as the tables of contents and the index are both compiled with respect to paging, so that citations and references will be made by pages. Volume I. is divided into an introductory chapter and two "Books." Book I. entitled "In What and in Whom Property in Literary Composition may exist,"—is again divided into four chapters, the first three of which, treating respectively "of Innocence," "of Libel," and "of Contempt of Court," are devoted mainly to the work of showing in what such property legally does *not* exist, namely in that which is immoral or dangerous, libelous, or in contempt of court. Chapter four of this book, "of Originality," might well be the beginning of our studies in the subject. Book II., entitled "of Property in Literary Composition before Publication," ramifies into only one chapter, which treats "of Manuscripts." Book III. occupies the whole of Volume 2, is entitled "of Property in Literary Composition after Publication," and is divided into seven chapters, entitled respectively, "History of Copyright," "of the Statutes of Copyright," "of Dramatic Copyright or Stage-right," "Newspapers and Periodicals," "of Legal Reports," "of Contracts concerning Literary Property," and "of Piracy." It is apparent at a glance that such an arrangement is largely factitious,

\* Vol. 1, p. 455.

† Vol. 2, p. 115.

‡ Vol. 1, p. 392.

§ Vol. 2, p. 620.

and will hinder rather than help the student or the reader. The subdivision into "Books" can be considered as nothing more than show, when one "Book" fills a volume of 700 pages, and another contains but one chapter. Without insisting that any strict analysis was necessary in this work, we venture to remark that the subdivision "Statutes of Copyright" naturally suggests "the Common Law Right of Authors" as a separate title; that most of the text in Book I. might well be grouped under the title of "Responsibility of Authors," and that other similar changes might have given us a logical division of the work into chapters.

As to the style of the work, the author has an evident bias in favor of what he calls "the English style" as distinguished from "the American." The former consists, according to Mr. Morgan, in giving, "in the body of the text, a sort of running history of the cases themselves, their *dicta*, rulings and progress—not unfrequently, even, of the argument, objections and strategy of counsel—trusting to the detailed and discursive report itself to develop the principles and rules for which he is seeking." This style he has followed in the present work. But why it should be called the English style, is not clear. Have the great lights of English jurisprudence followed this system generally, or exclusively, in their text-books? We do not remember that such was Mr. Chitty's favorite mode. Addison on Contracts was not constructed on that plan. Such American works as Burrill on Assignments give some details of cases, and such as Throop on Verbal Agreements give still more. There is not much difference in this respect between Starkie and Greenleaf; while as between two writers on Bills, Byles and Edwards, the American author goes rather more into the details of particular cases than does the Englishman. Parsons on Notes and Bills, gives scarcely any details of cases in his main text, but the appended notes are replete with them. Story, Washburn, May and other leading American text-writers have given us as many of such details, apparently, as was consistent with the space they had assigned themselves; and we are grateful to them for resisting the temptation to double their volumes by "padding," whether by the English or any other system.

When we come to the matter contained in these volumes, we must drop for a time the critic's pen. Mr. Morgan says in his preface, "There is a vast temptation to the writer of a work upon literary property, to allow himself to be led aside by the fascination of the subject; to be dazzled by the great names that glow

and sparkle under his pen." The same glamour affects the reviewer also, and awakens a sympathetic consideration for the author's weakness in yielding to the temptation he has named. Mr. Morgan has made extensive researches in the field he has occupied; he has labored *con amore*; and his affections have vacillated between law and literature. Unable to deal with them in the cold style of the law-writer, he has revelled at will among the treasures he has accumulated. He has produced a most delightful *mélange* of history, tradition, anecdote, precedent, statute, essay, debate, commentary, curiosity, romance and drama. It is an *olla podrida* of legal literature and literary law, whose most appropriate title of all would be "Law and Literature;" for it is not confined—the author has found it impossible to confine it—to literary property, or to law. It will be found interesting to the student, and entertaining to the practitioner as a relaxation from the severe labors of the office and the court room. If any professedly legal work may be allowed to draw us away from purely legal study, this is such a work. True, much of its agreeable miscellany is germane to the subject. Among the entertaining features of the work may be mentioned the history of legal reporting, or the "Literature of the Law," occupying considerable space in the main text,\* with a note on the curiosities of the reports;† a note containing the reports of committees to the bar association of New York on the defects in the legal reports of that state,‡ (a sample of which was given in the following syllabus from 15 How. Pr. Rep.: "This little case shows what a justice of the peace can do, when he tries"); a brief history of the French poet Crebillon's pioneer effort (1749) to establish the rule that the productions of the mind are not subject to execution for debt;§ the report of the case of Reade v. Sweetser, from 6 Abb. Pr. Rep., 9,|| with the charge to the jury, occupying 13 pages, on the question of the moral character and influence of Reade's Griffith Gaunt, and embracing some wholesome reflections by Mr. Justice Clerke on the "Liberty of Criticism;"¶ the case of Mumler, the "spirit-photographer," not elsewhere reported;\*\* the cases of Storey of the Chicago Times, and Bergh, the friend of animals, each charged with contempt of court;†† and the case of Buell, indicted under the "Poland Gag-law," from 2 Cent. L. J. 312‡‡

\* Vol. 2, pp. 515-529.

† Vol. 2, pp. 521-528.

‡ Vol. 2, pp. 532-563.

§ Vol. 2, p. 650.

|| Vol. 1, pp. 179-187.

¶ pp. 199-192.

\*\* Vol. 1, pp. 48-52.

†† Vol. 1, pp. 266-280.

‡‡ Vol. 2, pp. 501-509.

But what shall we say of the author's essay on the History of Letter-writing, occupying, with notes on the History and Curiosity of Letters and Printing, twenty-six closely printed pages ;\* of his history of letter posting ;† or his essay on originality ;‡ or his history of early printing and literature in England,§ with notes on the Biblical romances of Castillon,|| and the origin of the Star Chamber,¶ the decrees of Parliament and the Star Chamber concerning printing,\*\* and fac-similes from early book of the stationers' company,†† of his history of newspapers ;‡‡ of his own essay,§§ and Mr. Hotten's essay||| on the rights of authors to conserve and suppress their own works ; or of his pleasant essay on Poets Laureate,¶¶ introductory to the chapter on "Contracts?"

These are but some of his more pretentious literary offerings ; minor dainties crowd the table so lavishly spread before us by our author. He makes apt quotations from Dickens, Disraeli, Whittier, Dr. Johnson, Sir Philip Sidney, Boswell, Burton, Taine, Prof. John Fiske, Leslie Stephen, Potter's Greek Antiquities, and Aristophanes. He draws upon his scrap-book for curious advertisements ; and gives us the vicissitudes of the songs, "Minnie Dale," and "The Low Back'd Car." He introduces us to the Ancient Mysteries, Miracle Plays, and Moralities. With him we follow Dr. Holmes to Canada, to secure a British copyright in "The Guardian Angel ;" or listen in the British House of Commons to the eloquence of Talfourd. He takes us "behind the scenes," where we can discover the secret processes by which Boucicault, Collins and other play-wrights ply their trade. He plans five new novels for us, and constructs therefrom two rival dramas, out of which grows an interesting law suit—And as we lay down the book, we rub our eyes, as if awaking from a dream, and ask ourselves, is this law or literature?

We trust this glance at these volumes will be a sufficient warning to our readers not to take them up in hours devoted to study, unless in examination of some question of law therein discussed, and then to be watchful lest the fascinations we have referred to lead them away from the straight paths of the law into the flowery walks of literature. John William Wallace has not more capacity for elaboration of style, Franklin Fiske Heard is not more diligent

\* Vol. 1, pp. 417-443.

‡ Vol. 2, pp. 1-53.

\*\* pp. 20-40.

‡‡ Vol. 2, pp. 104-114.

† Vol. 1, pp. 470-486.

|| pp. 46-47.

†† pp. 48, 49.

||| Vol. 2, pp. 114-133.

‡ Vol. 1, pp. 306-322.

¶ pp. 10, 11.

¶¶ Vol. 2, pp. 371-380.

¶¶¶ Vol. 2, pp. 619-623.

and ardent in the collection of curiosities, and we doubt if Joel Prentiss Bishop ever exhibited more natural love for philosophical reasoning, than our author. Add to these traits the passion for literary study and the acquaintance with books and authors, which our citations from the work indicate, and the reader can not wonder that Mr. Morgan's allegiance is divided between Coke and Shakespeare, nor that he thinks of the court-room and Bench and Bar, when he reflects that

"All the world's a stage,  
And all the men and women merely players."

With such tastes as this work plainly indicates, it is a little singular that Mr. Morgan should despise literary merit, and hold himself independent of the English styles of grammar and history. He says: "It is at least a question whether literary merit is any merit at all in a legal work, whether, even, it is not a positive demerit." His consistent adherence to this theory will be evident from the paragraph quoted at the head of this review, which holds, apparently, that "it is the policy of the law \* \* \* not to become a burden upon his neighbors, or upon the state." Frequent instances appear of like independence of the rules of grammatical construction. Possibly it is from deference to the family prejudices of the Thompsons who edit our Law Journals, that Mr. Morgan habitually spells the name of the poet Thomson with a *p*. As to the merits of the celebrated Bacon-Shakspeare controversy, he seems to be in doubt; for he speaks in one place of "the author of Shakspeare,"\* and in two others of "his [Shakspeare's] day."† Reference is made to the case of Peacham, a clergyman, "found guilty of treason in the reign of Charles I., for certain passages in a sermon found in his study, which was never preached or intended to be preached,"‡ which statement differs, as to the period assigned, from the common tradition that Peacham was tried in 1614, in the reign of James I., being prosecuted by Francis Bacon as attorney-general. These idiosyncracies of the author would be subject to criticism, had he not disarmed criticism in advance by his disclaimer. It has frequently been remarked by legal writers that the great *literati* are unfortunate in the law which they incorporate into their romances. Reade's court-scenes are unreal and exaggerated; Wilkie Collins fails badly in the law of marriage which controls the destinies of his leading characters in "Man and Wife;" and the correctness of Shakspeare's law is even now a

\* Vol. 1, p. 322.

† Vol. 2, pp. 3, 304.

‡ Vol. 1, p. 59.

bone of contention. Would Mr. Morgan have these criticisms turned in full force upon the bar, or let it justly be said that the law has no rules of literature and wishes none?

There can be no literature in which grammatical construction and correctness of diction are more required than in the literature of the law; for reasoning and logic are its warp and woof, and the highest grammatical art must be employed in selecting and combining words and phrases so as to express legal opinions correctly and without redundancy; unless, indeed, it be a still higher art to construct a proper syllabus. The law-writer whose genius soars above the trammels of grammar, will find it sailing out of the reach of the rules of law. Proof of this may be found in the treatise before us. It is stated that an author's copyright is "practically in the nature of a monopoly," though it "is not a monopoly in the odious sense of that term,"\* and a "monopoly proper" is then defined as "a right given to one individual to produce or traffic in a commodity which others are fully as able to produce or traffic in as he, if permitted to do so." All this is contrary to the well-established definition of a monopoly as being the exclusive right to make, buy, sell or use something which was before of common right; nor does it consist with a prior statement of our author that "statutes of copyright do not grant monopolies."† Again, it is said, under the head of "Stage-right," that the author of a romantic work in reality possesses "three rights in his work, namely, his common law right, his copyright, and his stage right."‡ It is difficult to see any inherent distinction between the common law right and the statutory right of publication by copies, or between the common law right and the statutory right of representation on the stage. Mr. Morgan has himself said that "Statutes of copyright only shift the burden of proof in favor of the author," who "has given him by law, what in morality, equity and good conscience, he had before."§ He traces the common law stage-right from the early case of *Macklin v. Richardson*, Amb. 694,|| and his own citations show that that common law right was maintained in *Keene v. Wheatley*, 9 Am. L. Reg. 33; *Keene v. Clarke*, 5 Rob. 38; *Palmer v. DeWitt*, 47 N. Y. 532, and *Crowe v. Aiken*, 2 Biss. 208, in behalf of aliens, who had no claim to copyright. In *Keene v. Wheatley*, the plaintiff's claim was sustained also to common law proprietorship in

\* Vol. 2, p. 2.

† Vol. 1, p. 19.

‡ Vol. 2, p. 286.

§ Vol. 2, p. 3.

|| Vol. 2, p. 329.

the additions made to her drama by those in her employ while in the process of representation. The same plaintiff lost the case of *Keene v. Kimball*, 16 Gray, 545, on another ground. Mr. Morgan draws from these cases the "startling result" that the alien dramatist possesses greater privileges of protection, by not complying with our copyright laws, than he could secure by compliance, and greater even than the citizen dramatist may enjoy; and he has written articles for several magazines, complaining of this state of affairs, which he gives us in part, in Vol. 2, p. 301-2. His readers must see at a glance that this is a mere chimera; that the statutory copyright is but an affirmation of the pre-existing common law right, and that the latter must remain in every citizen dramatist, to precisely the same extent as enjoyed by the alien. Indeed, the author seems to have but a confused idea of the result of *Miss Keene's* cases, which he cites, judging from the text in vol. 2, pp. 356-363, in which, as we read it, he draws one line of conclusions from the differing cases of *Keene v. Kimball* and *Keene v. Wheatley*, stating that the one follows the other,\* and cites in full the points decided in the latter case, as a part of the rulings in the former.† Nor is he more lucid on the question whether a play not published may be pirated by means of an extraordinary effort of the mere memory. Referring to the early case of *Coleman v. Wathen*, 5 Term R. 245, where Buller, J., held that reproduction by such means was not piracy, he says this "conclusion has been implicitly followed by courts and legal writers for the better part of a century."‡ It is further stated, "There have been *but few instances* in which the question of memorization has come before an American court, and *that case* never was reported,"§ referring to *Wallack v. Williams*, N. Y. Sup. Ct., 1867. But it appears from the author's citations that the question was discussed in the four cases of *Keene v. Kimball*, *Keene v. Clarke*, *Keene v. Wheatley* and *Crowe v. Aiken*, in the first of which it was directly decided. Again, under the head of "Originality," the author says, "*The opinion seems to be* that in cases where a copyright of the original exists within the jurisdiction when the translation is made, that the unauthorized translation would be considered as an interference with the rights of the proprietor."|| No authorities are offered in support of this opinion. Nor does the author, under the head of "Originality," make any reference to the leading case of *Stowe v. Thomas*, a

\* p. 358.

- † p. 360.

‡ Vol. 2, p. 330.

§ Vol. 2, p. 337.

|| Vol. 1, p. 366.



Amer. Law Reg. 210, in which it was directly decided in 1853; that a translation, under the circumstances above named, of "Uncle Tom's Cabin" into German, was not forbidden by the statute. Yet the case is cited elsewhere, as holding that "a translation of a work is not a piracy of the original;"\* and this citation is under the head of "The Statutes of Copyright," and with no reference to the fact that under the act of Congress of 1870, authors may reserve the right to translate their own works. Mrs. Stowe's case has occasioned much discussion, and there has been considerable dissent from the conclusions there reached. The case as reported rests solely on the statutory copyright; and the conclusion of the court seems unavoidable that the statute then gave protection from unauthorized copy merely, but not from translation, as does the present statute.

But for the author's disclaimer of literary correctness, one would think these flaws indicated haste in the preparation of his work, as it contains other evidences of such haste, in imperfect, erroneous and duplicate citations and quotations. One of his longest references, and perhaps the fullest, to the case of *Becket v. Donaldson*† omits to state where that case is reported. A case is cited where one Smith, an attorney, was held guilty of contempt by writing on a docket an order of dismissal which reflected on the integrity of the court,‡ but neither the name of the case nor the volume in which it is reported, is disclosed. The statement that "the late celebrated charge of Judge Routhier, however, holding that a Roman Catholic priest was not responsible for words spoken in the pulpit, was reversed by —,"§ is wholly valueless, in the absence of information as to who reversed Judge R., and where his reversal may be found. The patent-right case of *Rubber Pencil Co. v. Howard*, is reported from the N. Y. Times of Aug. 8, 1875, in a note,|| without the information that it can be found in 20 Wall. 498. *Stowe v. Thomas*, 2 Am. Law Reg., is twice credited to 9 Am. Law Reg.,¶ and three times to 5 do.,\*\* two of these incorrect citations appearing on the same page. *People v. Wilson*, 6 Alb. Law Jour., is once said to be at p. 352 and once at p. 532††—and again is credited to 6 Alb. Law Jour., vol. 4.‡‡ There is a citation from 4 Sou. & Mar.§§ and there are two others

\* Vol. 2, p. 240.

† Vol. 1, p. 204.

\*\* Vol. 2, pp. 3, 4 and 610.

‡ Vol. 2, p. 674.

§ Vol. 2, p. 669.

¶ Vol. 1, pp. 258-261.

‡‡ p. 262.

‡ Vol. 1, p. 244.

¶ Vol. 2, pp. 2, 4.

§§ Vol. 1, p. 249.

from 29 Amer. Law Register.\* One of the latter refers to *Keene v. Wheatley*, which on the preceding page is incorrectly credited to 5 Rob. There is also a citation from "a Bish."†—meaning Bissell. *Emerson v. Davies* is twice stated with distinctness, within a space of six lines in the main text, to be "a leading case."‡ *State v. Gallaway*, 5 Cold. 326, is twice cited in the same note in one connection.§ Themistocles' apothegm on the desirability of forgetfulness is twice quoted at length.|| Lord Camden's statement that "glory is the reward of authorship," occurs four times.¶ Many defects will be found in the "Table of Cases," which can not be here enumerated. There are frequent inconveniences, also, in the construction of the work. The Canadian law of copyright appears in a note, instead of in the appendix, where other statutes are given. The Prussian copyright law is given in German words and English letters. The French laws are given in French; and a case is cited, and other quotations are made, in French, the use of which will, for that reason, be limited. The important case of *Lawrence v. Dana* appears in a note,\*\* occupying nearly the whole of 42 pages, but with portions of the principal text running over 32 of those pages. Indeed, it is common in these volumes to see notes thus extended, and notes under notes are of frequent occurrence, in some instances three tiers high, with a few lines of text at the top of the page. The practice of excessive annotating, especially of new works, is becoming very annoying to the profession. An old work, reaching several editions, frequently contains copious annotations, from a sort of necessity. But when a work on its first appearance vies with the late editions of Kent's Commentaries in annotations, it exhibits an error of construction, against which the bar must needs protest.

The faults which we have thus, in the discharge of duty, pointed out, will limit the usefulness of Mr. Morgan's work. But it will nevertheless be found useful as well as entertaining. It could not fail to be so, being the result of the author's researches, evidently with much assiduity and industry, into about 1,500 cases. In our judgment, the chapters on "Manuscripts," "Newspapers and Periodicals," and "Contempt of Court," will prove to be of especial value and interest to the profession; but the last two must

\* Vol. 2, pp. 356-357.

† Vol. 2, p. 286.

‡ Vol. 1, pp. 358 and 359

§ Vol. 2, p. 513.

|| Vol. 1, p. 4, and vol. 2, p. 335.

¶ Vol. 1, p. 9, text and note; Vol. 2, pp. 619 and 675.

\*\* Vol. 2, p. 576.

be studied together, as there are several cases of contempt by publications, not referred to in the chapter entitled "Contempt of Court." The subject of international copyright is made prominent in these volumes, and Mr. Morgan's treatment of it will attract attention. He aims to be the champion of the proposed reform, and controverts at length\* the arguments and positions of Mr. Morrill's Report in the United States Senate in 1873.† The subject, in many respects, is treated with vigor and force; but the reply to Mr. Morrill's constitutional objection is weak. The constitution provides that Congress may "promote the progress of science and useful arts by securing *for limited times* to authors and inventors the exclusive right to their respective writings and discoveries." Mr. Morrill thought that Congress could not consider the abstract or absolute rights of authors, because the terms of the constitution were "a limitation on the power of Congress against the recognition of such absolute right." To this Mr. Morgan indignantly retorts that "the right of a man to the offspring of his own brain is a natural and a moral right, secured to him by the unwritten law; and if the constitution of the United States, or any other written law, attempts to abrogate natural and moral right and unwritten law—except as a punishment for crime—that written law, whatever it is, and by whomsoever enacted, is, in just so far, null and void."‡ Mr. Morgan forgets that the constitution of the United States is a *grant* of power, and that Congress can exercise only the powers thereby granted to it.

We entertain no doubt that the American laws respecting literary property should be materially amended. The statutes should recognize the common law rights of authors as fully as possible, and give them the facilities for absolute control over their property, within the constitutional limits. These facilities should be made international. Whether for glory or for gain, the author should be allowed to control as he will the original creations of his own brain. None can feel this to be his right more keenly than the legal text-writer. A forcible argument in favor of international copyright is given in an article on the subject in the *Amer. Law Register*, Vol. 2, p. 137, in which the essayist, illustrating the natural rights of the author, thus describes a good law-book: "The law-writer, in years of labor and thought, collects the myriad decisions on some branch of the law, arranges them in a philosophic order, harmonizes their inconsistencies, deduces from them

\* Vol. 2, pp. 69-103.

† Vol. 2, pp. 69-78.

‡ Vol. 2, p. 79.

the principles which lie at their bottom, and by the hydraulic press of his mind, reduces the whole, like the preserved meats of the traveller, into a compact and portable form. What has been done by one, is done for all." We fear the "Law of Literature" has been too hastily and crudely constructed to abide this test. Let us hope it may not be used by some ingenious opponent as an argument against copyright.

If the law upon any subject be settled, and well settled—"if 'twere done when 'twere done"—the text-writer's work is but to state it clearly as it is. But when it is unsettled, and can only be properly determined by advancement and progress, as in the present case, then a champion is needed, with great philosophical and logical powers, and an inventive originality, to blaze the path and to lead the way, so that courts and legislatures may follow. Often such a champion is found on the bench—often, also, at the desk of the text-writer. An essayist in the present volume of this REVIEW,\* writing on the "Responsibility of Newspapers," furnishes an instance of this bold originality, quite within the scope of Mr. Morgan's labors, in proposing that newspaper proprietors be held to the simple common law liability attaching to all other persons undertaking a public employment, for *negligence* in the conduct of their business, thus avoiding the intricacies and imperfect workings of the law of libel. A new writer on Literary Property had a fair field opening before him, in more than one direction; not only could he become the champion of the rights of authors, but he could aid in a better understanding and arrangement of the law in all respects, as affecting literature and literary productions. In short, he could do for the Law of Literary Property what Mr. Bishop has done for the Criminal Law. Mr. Morgan has embraced the opportunity and occupied the field. How much he has accomplished for this branch of the law, it is too early now to attempt to say.

J. O. PIERCE.

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*II. M'CRARY ON ELECTIONS.*

How far the multiplication of text-books upon specialties shall be carried, and where a line is to be drawn beyond which the subdivision of the law into particular subjects shall cease, are questions which are assuming importance in the minds of the profession. Treatises on new topics are increasing so rapidly that their number is becoming a burden. The welcome vouchsafed to each new law book by the practitioner, is the involuntary challenge, "Who asked for you?" The volume now presented\* treats of a subject of especial importance in this country, where popular elections form so prominent a part of the political system. This fact furnishes the author a reason for preparing and offering this treatise to the profession and the public. As if doubtful whether the peculiar importance of political elections to the average American citizen was after all a sufficient warrant for the publication, the author adds: "Perhaps the most important purpose to be subserved by the publication of books of the law, is the prevention of litigation by informing the people as to their rights and duties; and it is hoped that this humble contribution to the law of elections may serve this purpose, by diminishing somewhat the number of election contests in the future, while at the same time affording some valuable aid and assistance in their proper decision, when they do arise."

The reason first assigned in this extract may suffice to authorize the publication of a good law-book; but "good wine needs no bush." Lest the same excuse may be advanced hereafter as the apology and the warrant for a worthless production, it may be well for the bar to testify at once their experience concerning this mode of preventing litigation. The opinion will be well-nigh universal, that litigation has always been, and is likely always to continue to be measured, by the litigious tastes of men, and the opportunities which acquisitiveness offers for the cultivation of the

\* A Treatise on the American Law of Elections, by George W. McCrary, of the Iowa Bar, member of the House of Representatives of the United States, and late Chairman of the Committee on Elections of that body. Keokuk, Iowa: R. B. Ogden, Publisher. Chicago: E. B. Myers, Law Bookseller. 1875.

controversial spirit. The law is called in to settle what the disputants can not settle between themselves. If law-books could help lawyers to give advice with absolute certainty, litigation should have been decreasing for many years past. But is it so? On the contrary, the manifold aspects which new disputes are constantly assuming by reason of the *new facts* involved therein, have been making, and will continue to make necessary, fresh appeals to the courts for the settlement of controversies. The new cases are very nearly like the old ones; but the slight changes in their facts call for new applications of those rules of law which are so elastic as to apply to any and all conditions of facts. A slight modification in the law of any state, changing the qualifications of voters, would be sufficient to make a new treatise on the subject of Mr. McCrary's work necessary, under the above named theory.

The other reason advanced for the production of this book is a valid one, and probably sufficient. The treatise can scarcely fail to afford valuable aid to both bench and bar who may be engaged in the consideration of election cases. And we think this the proper test of the necessity for, and the real value of the book. If the demands or desires of those members of the bar engaged in any specialty, authorize the production of a treatise on that specialty, the book has a voucher. A hearty welcome given it by that class will entitle it to a kind reception from the profession in general. If we find the increase of English text-books becoming annoying, we must remember the greater increase in the number of English-speaking people, and the immense field over which the new demands of their increasing litigations are spreading.

Mr. McCrary's work aims to treat of those questions growing out of the American system of popular elections, which have been adjudicated in the courts, and in legislative bodies which have examined into the qualifications of their own members. The field of discussion is thus limited to that heretofore occupied by adjudications; and the book may in one sense be called a monograph. The cases cited are drawn largely from the volumes of "election cases" heretofore published; yet the volume furnishes more than a digest, and bids fair to maintain itself even by the side of "Election Cases," because its summaries of the principles adjudicated take the form of a treatise, in which the logical connections of the cases are exhibited.

The style of the work is pure, and free from egotism. The author says, "I have myself entered into discussion, only when

considering unsettled or disputed points." He has adhered well to this canon. Very little—almost none—of his own individuality is obtruded upon the reader. This modesty gives evidence of a leading desire to illustrate the law as it is rather than the author's views of what it might be. Such should legal authorship be in general; it is an exceptional subject which warrants an extended presentation of original views. Many law-writers would have improved *any* opportunity to discuss the question whether the elective franchise, which is generally treated as a *right*, should not be primarily considered as a political *duty* rather than a right; or to present the question, now assuming prominence, of an educational qualification for that franchise, either in combination with, or as a substitute for, a property qualification. But, in the present state of both our politics and our jurisprudence, these questions address themselves mainly to the legislative bodies, and may well be omitted from a law treatise.

Mr. McCrary's researches have extended through over 500 cases, mainly American. These would seem to afford sufficient material; yet an examination discloses the fact that very many cases have been omitted. A monograph like this might well include every case, and treat exhaustively the law as already adjudicated. The book has no table of contents, so that we must grope a little in tracing cases and principles by the author's arrangement of his work. A very full index does not wholly remedy this defect. A few instances appear of incorrect citation, and errors of reference in the index, which are doubtless typographical errors. But the book on the whole presents an appearance highly creditable to the publishers. Mechanically, it must class among the best of our new law books.

One feature of its construction is entitled to especial notice and commendation. The text of the work, occupying about 400 handsomely printed pages, exhibits but two or three notes. The citations of authorities are given in the body of the page, in immediate connection with the text which such authorities illustrate. This arrangement of text and notes is exceptional. Tyler on Infancy gives an instance of its use. Why it should not be more frequently adopted by text-writers is a mystery, when its practical advantages, for both the cursory reader and the student are so apparent. The more common practice of placing all citations in foot-notes, may result in more typographical beauty, but it is so inconvenient as to be seriously objectionable. It must be sub-

mitted to as a necessity in an old work which is republished in original form, with its subjects brought down to a late date by an annotator. In the first edition of any treatise it should not be tolerated ; and Mr. McCrary deserves the thanks of the profession for the independence with which he has declined to follow a bad custom.

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### III. TENNESSEE CHANCERY REPORTS.\*

To the general rule that decisions of inferior courts are by necessity of little or no value as authority, exceptions have been made in the case of decisions of Chancery Courts of high standing and recognized ability. The success and reputation of the chancery court reports of Paige, Edwards and others may well induce the publication of similar reports in other states, where a distinct chancery court is maintained, whose decisions possess in themselves sufficient importance. In Tennessee, the appellate system is such that a chancery case taken to the Supreme Court is tried *de novo* upon the whole record; and thus the appellate court becomes, as to such cases, only a chancery court in a larger form and with a more extensive territorial jurisdiction. The difference between the decisions of the supreme and the inferior courts in the same case, will, consequently be measured by the difference in judicial ability and learning between the six judges of the former and the one judge of the latter. Chancellor Cooper is well known in his own state as a jurist whose carefully formed and well stated opinions will always have a great persuasive authority, even with the Supreme Court which may be called on to revise them. An examination of this volume will convince those to whom his reputation may be unknown, that his decisions will possess value in the eyes of the bar, and that the enterprising publishers are justified in their experiment of presenting a new series of chancery reports.

The present volume contains about 120 cases, occupying 640 pages of well printed text; some of these cases being two or three times reported in as many of their different phases. A large number of these cases display the prolixity common to chancery decisions; a prolixity savoring of redundance, which often embarrasses rather than assists the student. But this does not appear to be a fixed habit of the learned chancellor. The brevity and terseness of many of his decisions—notably those on matters of practice—convince us that he does not write long opinions from any

\* Reports of Cases in the Court of Chancery of the State of Tennessee, decided by the Hon. William F. Cooper, Chancellor of the Seventh Chancery District, at Nashville. Vol. I. St. Louis, Mo.: G. I. Jones & Co., Publishers. 1875.

mere love of displaying his learning, or from any motive other than to present cases fully.

The late appearance of the volume precludes any extended reference to the principles and points decided. To show the general character and scope of the decisions, we may mention that, outside of questions pertaining simply to the practice of the court, there are cases on the construction of wills and the duties of executors; on the transfer of trust property from one state to another; on the appointment and duties of receivers; on chancery sales and execution sales; on the use by a guardian of the *corpus* of his ward's estate; on specific performance; on resulting trusts; on relief against judicial admissions improvidently made; on building contracts; on voluntary and fraudulent conveyances; on improvements put upon dower land by a dowress; and on the liability of a wife upon contracts made while living as a *feme sole*. Among the cases of exceptional interest may be noted *Pennebaker v. Tomlinson*, 111 and 594, which holds that bonds deposited by a foreign insurance company doing business in Tennessee, are a trust fund, not subject to attachment, and beyond the reach of citizens of other states, (which accords with the Virginia case of *Rollo v. Andes Ins. Co.*, 3 *Ins. Law Jour.* 709); *Paul v. York*, 547, which holds that personalty of an infant, converted into realty, by decree, will, on the death of the infant under age, be distributed as personalty; *McCall v. McCall*, 500, on the power of the court to render a decree declaring the future rights of parties; *Edmondson v. Edmondson*, 563, on the devise of lands by a general clause of disposition in a will; *Lindsley v. Thompson*, 273, on the extent of estoppel by judgment; and *Atkison v. Murfree*, 51, on opening the biddings at a chancery sale, in connection with which reference is made to *Click v. Burris*, 6 *Heisk.* 539. See last case reviewed in a former number of this magazine, vol. 3, p. 423.

In *Ex parte Burns*, p. 83, the Chancellor held that the Tennessee act of 1871, so far as it undertook to clothe courts of chancery with the authority to create new corporations and define their powers, was unconstitutional, being an attempted delegation of legislative functions to the judicial branch of the government. This ruling has been sustained by the supreme court of the state in several cases not yet reported.

The plan of the volume is somewhat marred by the introduction of certain cases which can scarcely be called chancery cases; examples of which are *Harding v. Metz*, 610, a contest between a

vendor of personalty sold on the express condition of payment of the price, and an assignee of the vendee under a general assignment for creditors, which was a case of legal cognizance submitted to the Chancellor by consent; and *Bolling v. Anderson*, 128, a case of a writ of error *coram nobis*, and an assignment of errors in fact, a proceeding which in Tennessee takes the place of the ancient *audita querela*, and has been by statute extended to the chancery courts, which in this state have a considerable jurisdiction over legal questions, concurrent with courts of law.

A few of the cases reported will possess no especial interest to the bar outside of Tennessee; such as *Chadwell v. Jones*, 493, a somewhat anomalous proceeding brought under a particular statute, for the convenient collection of unpaid taxes on real estate. The same may be said of some cases adjudicating points of practice, peculiar to the chancery system of the state. But the examples we have given will illustrate the general and not local use of by far the greater portion of the cases reported in this volume.

Underneath the gravity of the learned Chancellor, there occasionally appears in this volume "the shrewd, dry humor natural to the man." Thus, we read of a bill which was demurred to because it was "both general and meagre," but was held sufficient for all practical purposes, because, like *Mercutio's* wound, it was "not as deep as a well nor as wide as a church door" (p. 495). We find a suit growing out of a contract to cultivate sage, and to cut and gather it "in the light of the moon," which is so unequal and one-sided as to remind the Chancellor of "heads I win, tails you lose" (p. 242), and in which a party in the hands of a *Shylock* is found to be "at his mercy, unless the court can, with the wisdom of a *Portia*, while conceding the construction as claimed, turn the letter of the contract into a weapon of offence" (p. 244). And we have an adjudication that the phrases "dear wife," and "beloved wife," in two several testaments, are so nearly identical that any distinction between them would be "a distinction without a difference" (p. 624). These instances give us a taste of that penchant for the humorous, which appears more prominently in Chancellor Cooper's quotations from the "crown's quest law" in "*Hamlet*," in the later case of *Williams v. Corson*, 2 Cent. Law Jour. 520.

The letter-press of this volume exhibits great typographical beauty, and is a credit to the taste of the publishers. Not the least among the valuable features of the book is a very full and

complete index, for which we understand we are indebted to the industry of Mr. C. A. Choate of the St. Louis bar. In this index we presume he has endeavored to give us a contrast to the faulty system of indexing criticised by him in 2 Cent. Law Jour. 660; for we observe that this is an index in fact, and not a mere repetition of head-notes—an example worthy of imitation by our reporters.

J. O. PIERCE.

MEMPHIS, TENN.

*IV. MILLER'S PLEADING AND PRACTICE.\**

In adopting the New York system of pleading and practice, the state of Iowa has made more changes in its details than are found in any other state. Many, perhaps most of them, are real improvements, while others are of doubtful utility. Thus the action is commenced by serving a notice upon the defendant, signed by the plaintiff or his attorney, that a petition will be filed in the proper clerk's office on or before a certain day named, and the notice must state in general terms the cause or causes of action. This is well enough, though the clerk would doubtless think a summons better. But another want of conformity to the general idea of code pleading is found in the more marked distinction between legal and equitable actions. If the remedy is at law, the action is brought by "ordinary proceedings," and if in equity, by "equitable proceedings," and the rules that determine which proceeding shall be adopted are the same as those that formerly decided the choice between a legal and an equitable action, except that certain statutory remedies are assigned to one or the other.

As a consequence, in Iowa a legal and equitable cause of action can not be united in one petition. With that restriction the right to thus unite different causes of action is almost unlimited, only they must all be either of a legal or of an equitable nature, that is, they must be such as must be prosecuted by the same kind of proceedings whether ordinary or equitable.

The permission given by the New York code, and by that of nearly all the states that have adopted its general provisions, of uniting in one petition certain causes of action, although they may have been heretofore called legal, and whose issues still require a trial by jury, with others heretofore called equitable whose issues now as heretofore are triable by the court, has been subject to much criticism. The Iowa codifiers were so impressed with the inconvenience of this union as not to permit it, and in some

\* A Treatise on Pleading and Practice in Actions and Special Proceedings at Law and in Equity in the Courts of Iowa, under the code of 1873. Revised Edition. By Wm. E. Miller, Chief Justice of the Supreme Court of Iowa. Mills & Co., Law Publishers, Des Moines, Iowa. 1875.

classes of actions the inconvenience is doubtless greater than the benefit. For instance, all causes of action founded upon contract may be united in one action, although some may be of a legal, and others of an equitable nature. Thus, one may frame a petition and embody in one statement or count a cause of action founded upon a promissory note ; in another, one founded upon a breach of an agreement to pay for services, and in another, one based upon a refusal to convey land according to contract, asking upon the first two a money judgment and upon the last a judgment for specific performance. In the first two causes of action the parties are entitled to a trial by jury, but not in the last ; there necessarily results two trials, and the matters embraced in the judgment must be kept as distinct as though rendered in different actions. There is little to be urged in favor of a union of this kind ; there is no saving of labor, if the parties stand upon their rights as to the mode of trial, and very little, if any, saving of expense, and the causes have no connection whatever.

But there is another class of causes of action of which some may be legal and others equitable, that are linked together, and it is proper, and may be important, that they all be decided at one time, or in such connection as to be embraced in one judgment. I refer to causes that arise out of the same transaction or are connected with the subject of the action. By the New York code, and by the codes of some twelve other states, causes of action thus arising or connected can be united in one petition, although some are called legal and others equitable. Thus, in an equitable action to foreclose a mortgage—and I speak of an equitable action as distinguished from the statutory action for the same purpose—or to enforce a lien for purchase money, or one otherwise created, the owner of the paper secured by the mortgage or the lien, may wish a separate money judgment upon the paper. If the money action can not be united with the equitable proceeding, it will be necessary to sue separately or forego one of the remedies, and it is better that they be united. If this is done, the judgment would naturally be an ordinary one upon the instrument secured, upon which execution might issue, and also an order for a sale of the premises upon which the lien attaches for its satisfaction as far as the proceeds of the sale will go. The advantage of the union is that the proceedings after judgment will be upon the same record, that it will be shown when the claim is satisfied, whether by the ordinary execution out of other property, or by the sale of the premises

affected by the lien. In some of the states this result is secured in a statutory action for a foreclosure, by authorizing a judgment and an execution for any balance remaining unpaid after a sale of the mortgaged premises, but in an equitable action purely, there can, upon principle, be no money judgment with ordinary execution, when the legal cause of action existed at the commencement of the suit, and which was not dependent upon the equity. The two causes of action must then be pursued separately, unless they can be united in one action. There may be other transactions so connected with the subject of an action as to make it desirable that differences in regard to them be all adjusted together, although the demand arising out of some of them will constitute a legal cause of action, while that springing from another will require a proceeding as in equity; and it would seem, when this connection exists, that they should be united in one petition.

Notwithstanding the Iowa code still holds on to equitable proceedings, the old bill in chancery finds no place in them, and, in general, the pleadings are governed by the same rules that apply in ordinary actions. I say in general, for it is not true altogether, inasmuch as in equitable petitions and for more convenient reference, the several allegations must be made in distinct paragraphs, and humbered as such; and the court is authorized to order the testimony to be taken in the form of depositions, or, if offered on the trial, to be reduced to writing.

Whatever may be thought of the policy of thus preserving in part the equity system of procedure, and forbidding the union in one petition of equitable and legal causes of action, there can be no difference of opinion as to the propriety of suffering equitable defenses to legal causes of action; and it is gratifying to see that this is permitted by the Iowa code, which goes so far as to allow equitable counter claims.

The scope of a demurrer is extended by the Iowa statute. Leaving out the usual ground that causes of action are improperly united, the sixth is as follows: "That the petition on the face thereof shows that the claim is barred by the statute of limitation; or fails to show it to be in writing when it should be so evidenced; or, if founded on an account or writing as evidence of indebtedness, and neither such writing, account, or copy thereof is incorporated into, or attached to such pleading, or a sufficient reason stated for not doing so."

Three perplexing questions are here settled. First, that the pro-

tection of the statute of limitations may be invoked by demurrer, which was generally, though not universally, conceded before. Second, that the petition must show the contract sued on to be in writing, when, under the statute of frauds, it would be invalid if not written or evidenced by a writing. Very unfortunately, the courts of New York, Missouri, Ohio, and perhaps other code states, had, after the adoption of a statute requiring that the pleading should state the facts constituting the cause of action, ruled it to be unnecessary for the pleader to say that a contract sued on was in writing, although worthless if not in writing; that is, that the fact of the writing, though a material one and without which there is no cause of action, may be left out of a pleading which is expressly required to state the facts constituting the cause of action! This inconsistency arose from not seeing that a certain rule of common law pleading, to-wit, with respect to acts valid at common law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation as was sufficient before the statute, so far as it applied to matters covered by the statute of frauds, had been by implication, if not directly, swept away by the code. The third matter embraced, as above, in the sixth ground for demurrer, to-wit, the non-incorporation into, or pleading of an account, or writing, or copy thereof, when it is required, would probably be available upon the ground given in all other codes, that the petition does not state facts sufficient to constitute a cause of action. This ground of demurrer is not in the words contained elsewhere, but the Iowa statute gives it in the following language: "5. That the facts stated in the petition do not entitle the plaintiff to the relief demanded." A singular change, inasmuch as Judge Miller gives to it the same interpretation as that of the other phrase. It would naturally mean that a demurrer would lie to a pleading because it demands relief to which its averments will not entitle the party—a meaning which, it appears, is contrary to the one it is supposed to have.

There are some other changes which I will not now notice.

I have looked carefully over the principal provisions of the book whose title is at the head of this notice, and the perusal has given me great pleasure. It is a carefully prepared book of practice under the Iowa code, giving with clearness and precision every step in the trial of a cause, with forms for attorneys and for the sheriff and clerk, and devoting as much space to pleading as is consistent with the scope of the work. A volume of 750 pages,



embracing practice and its forms, can not go into detail upon this subject; yet what is said is well and clearly said, and the author shows an appreciation of the spirit of the new system. As a specimen of this appreciation, I give an extract on page 124, in regard to the provision, I believe contained in all the codes fashioned after that of New York, that the sufficiency of a pleading is to be determined by the code and not by the old rules. This has puzzled many pleaders, and they cannot see how, in consistency with it, we so constantly refer to old rules and principles. The author says:

"The code has not only swept away the former systems, but it requires that the sufficiency of all pleadings under the new system, instead of being tested by the rules of the common law, shall be tested by those furnished in the code.

"The rules for the determination of the sufficiency of pleadings to which the code refers, are manifestly rules of pleading and not rules of law; because, to determine whether a pleading contains sufficient facts to constitute a cause of action we must often look to the rules and principles of law or equity, not furnished by the code, for by them we determine what facts constitute a cause of action. Nor does the code abolish those rules of sound logic by which the sufficiency of pleading is determined. Rules which have their foundation in reason and good sense are important aids in the investigation of truth, and manifestly tend to the furtherance of justice and retain all their original force and authority. But in determining the sufficiency of any *pleading*, the rules of pleading prescribed in the code are to be our guide, and not the technical, artificial and fictitious rules of the common law."

Again, on p. 126, commenting upon the rule that evidence should not be pleaded, he thus briefly and clearly shows its propriety: "No right of recovery can be based on evidence; it must be based on established facts; various evidence may lead to the same facts, or evidence may be of opposite kinds; and yet the facts involved may be correctly found. Infinite issues might be based on the statements of evidence, and yet none of them establish the facts which entitle a party to redress in a court of law or equity. The existence of the facts is the foundation for the right, and their existence is established in the minds of a jury by evidence." And afterwards are given some excellent illustrations of this rule.

The distinguishing characteristic of the whole book is the simpli-

city and the clearness with which all the directions are given, and for mere practical work, it is seldom that the Iowa practitioner will need more, and, of course, no one will try to practice without it. Almost one hundred pages are given to pleading, which is sufficient for an outline view, especially with the thorough comprehension of the spirit of the code and the power of condensation which the author seems to possess, yet it is impossible fully to discuss any one question. The book is hence rather a hand-book of local practice than such a treatise as shall thoroughly possess the student with the subject of pleadings as a science, and it does not profess to be any more. Yet as such hand-book, I have seen none from any state which I consider equal to it, and the bar of Iowa are to be congratulated upon the great aid it must afford them.

Too much praise can not be given to the publishers for the style of the book. It is on the best paper, is the best printed, and best bound law-book I remember to have seen from an American press. It is a pleasure to look at and handle it, and reminds one of the best class of English law-books. I once knew a Western territory which was organized in advance of any considerable settlement. The first legislature was called together of some thirty or forty members in both branches, leaving, perhaps, a little over double the number of people at home. A batch of laws were adopted, and the secretary of the territory took the manuscript to Boston. I was afterwards shown a volume in Washington by a gentleman who wondered that such fine work could be done in so new a territory. I looked for the Cambridge press imprint, and, not seeing it, let him wonder. Now I do not make this allusion to intimate that the work on this book was done outside of Iowa. I know that intelligent, enterprising and progressive state too well to suspect it, and besides, it is too good work for the East. But with all my appreciation of this great and gallant, though as yet but thinly peopled state, I was a little surprised to find a publishing house in a small inland town, setting such a fine example to the oldest and richest cities in the Union. It is to be hoped that the example will be followed.

P. BLISS.

*V. BISHOP ON THE LAW OF MARRIED WOMEN.\**

The legal profession will be pleased at the completion of the second volume of this valuable work. Mr. Bishop, in the various branches of law on which he has written, has acquired a reputation equal, perhaps, to any American writer. On law subjects he has been somewhat voluminous, and his every work has become of great use and constant service to the profession.

These commentaries embrace the Law of Married Women under the statutes of the several states, and at common law and in equity. The author expresses his great unhappiness that so long a time should have elapsed between the publication of the first and second volumes of this work. He informs us that the reason was, all his other works were nearly out of print, and the making of the required new editions detained the present volume so long. We are pleased; however, to welcome the book at last to the office of the lawyer. The subject is an interesting one, and in one respect is constantly presenting new points of law. Until within the last few years the English common law and the principles of equity defined, or we may rather say, restricted, the rights of married women. The general subject which fills this volume is new to the profession, because it treats of the statutory rights of married women, a branch of law but recently introduced into American jurisprudence, and borrowed, perhaps, from us by English legislators. We allude to the "Married Women's Property Act," 33 and 34 Vict. c. 93, adopted in 1870.

In every state of the American Union, as far as we are able to ascertain—Virginia only excepted—there has been passed a series of acts relating to the rights of married women, chiefly intended to secure to the wife greater control over her property or the fruits of her labors, or protection from the debts of the husband; than she had under the common law. The entire system of the common law is altered by the humane principles of the statute law,

\* Commentaries on the Law of Married Women under the Statutes of the Several States, and at Common Law and in Equity. By Joel Prentiss Bishop. Vol. II. Boston: Little, Brown & Co. 1875.

now so universally adopted as a just and necessary homage to "woman's rights."

Our author has noticed with his proverbial care and accuracy, in alphabetical order, from Alabama to Wisconsin, the legislation of the states on the subjects embraced in this work.

Chapter 46 is entitled, "Things Special to Individual States." The purpose of this chapter is to bring to the attention of the lawyer the common law on this subject; then the constitutional provisions; then the history of legislation thereon. In this lucid and able chapter the reader will also find the decisions of the highest courts of each state, on every question relating to the laws on the subject of the rights of married women. This feature will certainly popularize and bring into general use the work now under notice, especially when it becomes universally recognized that our author has treated the subject in a manner remarkable for its clearness and accuracy.

In relation to the manner of treating the subjects embraced in the volume before us, we make the following quotation from the author: "The course, therefore, will be the following: After stating in a series of chapters, some rules by which these statutes are interpreted, and the effect of some forms of statutory provision under the restraints of our written constitutions—and bringing to view the doctrines which determine the consequences of these statutes in things beyond their terms, with some special applications of those doctrines,—we shall take up the several topics at large; the author to say and cite what may seem necessary in connection with each of them." Section 4.

In the first volume the author confined himself principally to the unwritten law. In the second he has brought out the recent legislation, with the interpretation given by the courts, in which in a very able manner is shown how legislation has modified the doctrines of the common law. In this vast and intricate discussion of the various statutory modifications of the unwritten law, embracing an extensive field of equity jurisprudence, the learned reader will not fail to appreciate the great erudition and acknowledge the clear and forcible style of the author.

It is due to the publishers, Messrs. Little, Brown & Co., to say that the mechanical execution of this book is all that can be required at the hands of the most fastidious.

W, A. C.

*VI. WHITMAN'S PATENT CASES, VOL. II.\**

The title of this volume very accurately expresses its contents. It includes all patent, copyright and trade-mark cases decided by the Supreme Court of the United States, from the first of Black to the twentieth of Wallace, both inclusive. These cases appear to be simply reprinted from the reports from which they are taken, without any alteration, preserving in each case the original syllabus, statement of the facts, and diagrams used in illustrating the various mechanism and processes inquired into. In reproducing the cases as originally reported, we think the editor has done wisely, since it is doubtful whether he could have improved his volume by changing in any respect the work of as able reporters as Mr. Wallace and Judge Black. This volume also contains what the editor assures us is a table of all American patent, copyright and trade-mark cases which have been cited, affirmed, approved, explained, doubted, disapproved, overruled, or reversed, in the reports of the Federal and state courts. This table, if full and accurate (as we believe it is), is alone worth to the patent lawyer the price of the book. Another valuable feature which exhibits the pains-taking care of the editor is a chronological table of the patent laws of the United States and of the British statutes relating to letters patent. In the appendix is likewise reprinted that portion of the Revised Statutes of the United States relating to patents for inventions. The editor states that a volume containing all decisions of the court made prior to the December term of 1861, and now to be found scattered through the sixty volumes comprising the reports of Dallas, Cranch; Wheaton, Peters, and Howard, is in the course of preparation. The fact that the volume embracing the latest cases is published first is perhaps to be regretted, since it will create confusion in citing the two volumes.

\* Patent Cases determined in the Supreme Court of the United States, including Copyright and Trade-mark Cases, and a Table of all American Patent, Copyright and Trade-mark Cases which have been Cited, Affirmed or Reversed. By Charles Sidney Whitman, author of "Patent Laws and Practice for obtaining Letters Patent for Inventions" Washington: W. H. & O. H. Morrison. 1875. Royal 8vo. pp. 791. Price \$10, net.

This volume, which is now not numbered at all, will, therefore, when the other volume is published, become volume two, and we have taken the liberty of so numbering it at the head of this notice.

In mechanical execution this volume resembles Wallace's Reports, but the pages are larger, the paper heavier, and the press-work perhaps better.

### VII. WOOD'S CIRCUIT COURT REPORTS, VOL. I.\*

This handsome volume contains, in 740 pages, about 120 cases, embracing opinions of Mr. Justice Bradley, Mr. Circuit Judge Woods, and, in a few cases, of the District Judges. From the fact that some of these cases date back as far as 1867, we infer that the design of the learned judge has been to publish only such cases as were deemed to be of leading importance. We doubt, however, whether this purpose has been faithfully adhered to in all instances; for we notice several cases which have been passed upon by the Supreme Court of the United States, some of which have been reversed. Conspicuously among these we notice "The Slaughter House Case," p. 21, opinion by Bradley, Circuit Justice, reversed, 16 Wallace 36, the report here not stating that fact. We do not perceive what excuse can be adduced for again reporting this case, since Mr. Justice Bradley, in his dissenting opinion in the court above, no doubt substantially went over the grounds of his opinion here. So, *United States v. Gay's Gold*, p. 55, was affirmed in 13 Wall. 358, but the report here refers to the decision in the highest court. Again "The Confiscation Cases," p. 221, opinion by Mr. Justice Bradley, are given here, although they were subsequently disposed of in the Supreme Court, some affirmed and some reversed, 20 Wall. 92. And so of other cases in this volume. Now, in view of the burden which the multiplication of law books is entailing upon the profession, we do not perceive what apology can be made for reporting the decisions of a *nisi prius*, or of an intermediate appellate court, after they

\* Cases argued and determined in the Circuit Courts of the United States for the Fifth Judicial Circuit. Reported by William B. Woods, the Circuit Judge. Vol. I. Chicago: Callaghan & Co. 1875.

have been passed upon in a higher court, and after the judgments of that court have been reported. It matters not whether in the court above such a case has been affirmed or reversed. Once passed upon by that court, the decision of the inferior court becomes almost valueless as a precedent. We regret the reporting of these cases the more in this instance, since there must have been in the written decisions of the various judges who have held the circuit courts in the Fifth Circuit, during the past six years, abundant material, without resorting to cases finally determined in the Supreme Court, to make a volume of great use to practitioners within that circuit, and valuable to the profession at large. With the exception of this fault (which others, however, may not consider a fault), a somewhat hasty examination discloses nothing in this volume which we cannot commend. The index shows that the cases cover a wide range of subjects, many of the questions decided being interesting and important. We regret that our space does not permit us to notice some of them. Judge Woods, whose judgments constitute the larger number of cases here reported, is one of the ablest of the nine federal circuit judges, and is, we understand, highly respected by the able and exacting bar of his circuit. The mechanical execution of this book is in all respects first-class.

*VIII. MILLER'S DECISIONS.\**

The late Justice Curtis of the Supreme Court of the United States succeeded in condensing into twenty-one volumes all the decisions of the Supreme Court of the United States from the organization of the court to the 17th of Howard, inclusive. These decisions, in the original reports, occupied fifty-seven volumes. This great saving of space was attained chiefly by eliminating the extended statements of facts made by the reporters and the elaborate notes of the arguments of counsel. To do this judiciously required a master-hand; and such Judge Curtis unquestionably possessed. The high satisfaction with which his work was received warranted the belief on the part of the owners of the copyright of the succeeding volumes, that in the hands of an editor of equal experience and ability a condensation of such volumes, or, at least, of such of them as were out of print, would prove equally acceptable to the profession. To perform this task the publishers very wisely selected Mr. Justice Miller, who, for comprehensive grasp of intellect, intuitive power to seize upon the salient points of a case, and power of condensed statement of legal principles, is not surpassed by any of the eminent judges who now compose that great court, if indeed he has ever been surpassed by any who have heretofore been members of it. Under the judicious pruning of so able a hand, the six volumes of Howard from the 18th to the 23d inclusive shrink into three volumes of convenient size, preserving the opinions of the judges entire, and omitting nothing which the ordinary practitioner will ever need to refer to. We learn that it is the purpose of the editor and publishers to conclude for the present the series with another volume which will embrace the 24th of Howard and two volumes of Black. We regret that the series will not be continued through the reports of Wallace; but as these volumes are stereotyped, it cannot, of course, be expected that the publishers of them will enter upon a course which would destroy so valuable a property.

\* Reports of Decisions in the Supreme Court of the United States. By Samuel F. Miller, LL.D., an Associate Justice of the Court. Volumes I. II. and III. Washington: W. H. & O. H. Morrison. 1874 and 1875.



*IX. OTHER BOOKS RECEIVED.*

The following books have been received, and will probably be noticed hereafter :

1. **BIGELOW'S LEADING CASES ON TORTS.**—Leading Cases on the Law of Torts, determined by the Courts of America and England. With Notes. By MELVILLE M. BIGELOW. Boston: Little, Brown & Co. 1875.
2. **HILLIARD ON TAXATION.**—The Law of Taxation. By FRANCIS HILLIARD, author of "The Law of Torts," "The Law of Mortgages," etc. Boston: Little, Brown, & Co. 1875.
3. **BROWNE ON INSANITY.**—The Medical Jurisprudence of Insanity. By J. H. BALFOUR BROWNE, Esq., of the Middle Temple and Midland Circuit, Barrister-at-Law, Registrar to the Railway Commissioners, author of "The Law of Carriers," etc. Second Edition, with references to Scotch and American Decisions. San Francisco: Sumner, Whitney & Co. 1875.
4. **PHILLIP'S PRACTICE.**—The Statutory Jurisdiction and Practice of the Supreme Court of the United States, together with Forms of Process and Rules established for the Supreme Court, the Court of Claims, the Courts of Equity, the Courts of Admiralty and the Courts in Bankruptcy. By P. PHILLIPS, Counsellor of the Supreme Court of the United States. Revised Edition, October, 1875. Washington: W. H. & O. H. Morrison. 1876.
5. **BARTLETT'S FAMILIAR QUOTATIONS.**—Familiar Quotations: Being an Attempt to Trace to their Sources Passages and Phrases in Common Use. By JOHN BARTLETT. ["I have gathered a posie of other men's flowers, and nothing but the thread that binds them is mine own."—Montaigne.] Seventh Edition. Boston: Little, Brown & Co. 1875.

••• Publishers are reminded that in order to secure suitable notices of books, they should be sent at as early a date as possible. In order to secure notices of books in the next number of the REVIEW, they should be sent during the month of January.

## Notes of Recent English Decisions.\*

*Husband and Wife—Separation—Deed of Settlement—Trusts for Wife, Husband, and Child—Whether Annulled by Resumption of Cohabitation—Legal Debt of Wife before Marriage—Wife's Equity to a Settlement.*—*Ruffles v. Alston.* 44 L. J. R., 308, Chancery. In this case one of the plaintiffs, Clementina Ruffles, was the wife of John Alfred Ruffles, who had become bankrupt, and the defendant was his trustee in bankruptcy. This married plaintiff, under the will of her father, who had been dead many years, became entitled to a portion of his estate, before her marriage. In 1867, Mrs. Ruffles and her husband separated, and upon that separation a deed was executed, which was a deed of separation, and also provided for the husband in the event he survived his wife, and also made provision for the child of the marriage. This deed recited that the sum of 728*l.* secured upon the promissory note of her brother, who held her portion of her deceased father's estate for her, was still due to the wife, and provided that it should be lawful for her brother to pay to the wife, during the joint lives of the wife and husband, the interest on the 728*l.*, secured by his note. In this deed the brother of the wife joined, and covenanted with the husband to stand possessed of the said sum of 728*l.* upon trust, to pay the interest thereof to the wife for her life, and, after her death, to the husband for his life, and, after the death of the survivor of them, to pay the principal to their child absolutely. This deed was made in 1867, and the husband and wife lived apart until 1871, when they resumed cohabitation, and, at the time the bill was filed, they are still living together. Interest was paid on this note to the wife until 1873, when her husband became bankrupt, and his trustee claimed to have the 728*l.* paid to him by the brother, as forming part of the bankrupt's estate. The wife claimed to be entitled to have the money held upon the trusts of the deed of November, 1867, or settled for the benefit of herself and issue, and accordingly filed her bill, joining her infant child as plaintiff praying that the trusts "of said indenture of settlement, of the 5th of November, 1867," so far as they related to the said sum of 728*l.*, might be carried into execution under the direction of the court, or that she might be declared entitled, in equity, to have a settlement of the said sum made upon herself and issue. The defendant creditor's trustee demurred to the bill for want of equity, on the ground, first, that the deed was not a

\* Prepared for the REVIEW by George M. Stewart, Esq., of the St. Louis Bar, Dean of the Law Faculty of Washington University.

settlement but a mere separation deed, annulled by the resumption of cohabitation; and, secondly, that the debt, being a legal *chose in action* of the wife before marriage, belonged to the husband. The demurrer was overruled; the court held, that the deed made provisions for the wife and child beyond the scope of a deed of separation, which was not annulled by the subsequent cohabitation.

*Inn-keeper's Lien on Goods not the Property of Guest.*—Threlfall v. Borwick. 44 L. J. R. 87, Queen's Bench. This was an action brought in detinue, to recover damages for the detention of a piano by the defendant, and for the return of the same to the plaintiff. The plaintiff was a dealer in musical instruments, carrying on business at Ulverston; and the defendant was an inn keeper and tenant of the Ferry Hotel, Windermere. In December, 1870, one Richard Butcher, then residing at Lawrey, near Windermere, hired from the plaintiff the piano in question, for a period of six months, or longer if he liked. It was delivered to Butcher at his then residence. In the month of April, 1871, he left his own house, and went with his wife and family to the defendant's hotel, and took with him, among other things, the piano, which was placed and used in the sitting room occupied by him and his family. Mr. Butcher remained with his family at the defendant's hotel till June, 1871, when he left, owing the defendant 52*l.* 18*s.* 1*d.* for the room and for board and attendance. The defendant, when Mr. Butcher left his hotel without paying the above amount, seized and detained the piano for the money due him from Mr. Butcher. Until September, 1871, when the plaintiff called at the defendant's hotel, the defendant did not know that the piano was the property of the plaintiff. The plaintiff, until this time, did not know that the piano was at the defendant's hotel, when he went there, and said that the piano belonged to him, and afterwards brought this suit. Coleridge, C. J., held that the defendant had a lien upon the piano for the debt due him from Butcher. It was contended by the plaintiff, that the defendant was not bound to receive the piano as part of the goods of the person coming to the inn. To this the Chief Justice says: "I should certainly have thought that in such a case as the present, it might well be held, that the innkeeper was bound to receive such a thing as this piano, which a person may take about for his accommodation and amusement; but whether that be so or not, having taken it in, the innkeeper stands on the same footing with regard to it as with regard to the rest of the goods of the guest."

*Carriers by Railway—Negligence in Carrying Passengers to Wrong Station.*—Hobbs and wife v. The London and Southwestern Railway Company. 44 L. J. R., 49, Queen's Bench. In this case it appeared that the plaintiffs took tickets, to be conveyed from Wimbledon station to Hampton Court station. It so happened that, on that night, the train did not go to Hampton Court, and the plaintiffs were taken on to Esher station, which increased the distance they would have to go from the railway station to their home by several miles. Damages were asked on

two grounds: 1st, for the inconvenience the husband and wife sustained by having to go this distance with their children, the night being wet; 2d, by reason of the wife, from exposure to the wet, catching a bad cold, whereby expense was incurred for medical attendance and extra nourishment. It was held by Cockburn, C. J., that the plaintiffs could recover damages for the inconvenience to which they had been exposed, but not for the illness of the wife, or its consequences, the damage from these being too remote, and not flowing immediately from the cause of action.

*Action by Executor—Injury to Personal Estate of Testator—Breach of Contract whereby Bodily Harm is inflicted upon Testator—Remoteness of Damage.*—Bradshaw, *et ux.* v. The Lancashire & Yorkshire Railway Company. 44 L. J. R., 148, Common Pleas. This was an action brought by Robert Bradshaw and Fanny, his wife, executrix of the last will and testament of James Clough, deceased. The facts were that James Clough was a passenger on defendant's road, and had engaged passage from Miles Platting to Manchester; that, while making this journey, he met with an accident, through the fault of defendant, which occasioned him bodily harm. In consequence of this, he was unable to attend to his business of a bootmaker, which became less profitable to him, and he incurred medical expenses in endeavoring to cure his bodily injuries. He died of a disease unconnected with the accident. His executrix sued to recover compensation for the sums expended in medical attendance, and for the loss of profit arising from the deceased's inability to attend to business. The declaration was framed upon a contract between the said James Clough and the defendant; and alleged that, by breach of it, his personal estate was lessened in value. At the trial the jury found for the plaintiff 200*l.*, 160*l.* of which was for the loss sustained in Clough's business, and 40*l.* for the medical expenses. In support of the rule to show cause, etc., it was urged by the defendant—1st, that the maxim "*actio personalis moritur cum persona*" applied; 2dly, that damages given in respect of the loss of profit in C.'s business were too remote. Grove, J., in deciding the case, *inter alia*, said: "The damage sustained by the executrix is of two kinds: First, money expended in endeavoring to cure the testator of his bodily injuries by medical assistance; secondly, loss of profit arising from his inability to attend to his business. \* \* \*

Then it has been urged that the maxim, *actio personalis moritur cum persona*, applies, and that the remedy dies with the person; but when bodily harm is sustained, owing to a breach of a contract, two causes of action may accrue to the person injured; he may obtain compensation for his bodily sufferings, and also for such injury as his personal estate may sustain. The two causes of action are distinct from each other, and the executrix of Clough sues for the diminution of his personal estate. I think that the remedy for this injury survives to her, and that the maxim which has been cited, does not apply; the present action,

being founded upon contract, will lie after the death of the person who has sustained the pecuniary loss. It has been further contended that the damages given for the loss of profit in the testator's business are too remote. The defendants' counsel have relied upon *Hadley v. Baxendale*, 9 Exch. Rep. 341, but I do not think that that case assists them. The rule there laid down is, that when a contract has been broken, the damages to be recovered are either such as may fairly be considered to arise naturally from the breach—such as may reasonably be supposed to have been in the contemplation of both parties at the time of making the contract. If a different rule were allowed, enormous damages might be recovered, when the party in default had received only a trifling consideration; but I think that the loss in the business was the natural consequence of the testator's inability to attend to it, and the defendants may reasonably be supposed to have contemplated at the time of his becoming a passenger, that, if he received bodily hurt by this negligence, he would suffer loss in whatever business he might be engaged."

*Contract—Construction of—Vesting of Machinery to be fitted to a Ship—Payment by Instalments.*—The Anglo-Egyptian Navigation Company v. Rennie *et al.*, 44 L. J. R., 130, Common Pleas. This case was as follows: By a contract between the plaintiffs, the owners of a steamship, and the defendants, engineers, the defendants were to supply new boilers and various parts of machinery for the ship, and to alter the engines according to a specification, and the engines and boilers and connections were to be completed and ready for sea and tried under steam previous to being handed over to plaintiffs. Due notice was to be given by the plaintiffs to the defendants of the date at which the ship was to be placed in the hands of the defendants, after the work was ready, to have the engines completed, the price to be 5,800*l.*, payable as the work progressed as follows; viz., when boilers were plated, 2,000*l.*; when the whole of the work was ready for fixing on board, 2,000*l.*; and when the ship was fully completed and tried under steam, 1,800*l.* These payments were to be made only on the certificate of the plaintiffs' inspector, that the conditions entitling the defendants to recover such payment had been fulfilled. The whole of the old materials necessarily taken from the vessel by reason of the execution of the contract was to become the property of the defendants, and the value of such old materials was 353*l.* The plaintiffs gave the defendants due notice that the vessel was ready to be placed in their hands on a certain date, but on hearing that the defendants could not promise to be ready by that date, the plaintiffs sent her on a voyage, on which she was lost by perils of the sea. The boilers were plated by a certain day, and afterwards, on a certain other day, the whole of the work was ready for fixing on board the vessel, and the plaintiffs' inspector having, on each occasion, given the necessary certificate, the plaintiffs paid the first and second 2,000*l.*, according to the contract. At the time of payment of such second 2,000*l.*, the plaintiffs knew

but (?) did not know of the loss of the vessel. With this state of facts an action was brought by the plaintiffs to recover the boilers and machinery allowed to be detained by the defendants from the plaintiffs, with damages for their detention, or to recover back the sums of money paid defendants by the plaintiffs. The case by consent was submitted to the court without pleadings. On the part of the plaintiffs it was contended that the property in the boilers and machinery and other matters prepared by the defendants and ready to be fixed in one of the boats, had passed to the plaintiffs. In support of this contention, several cases are cited, and among them *Clarke v. Spencer*, 4 Ad. & E. 448; *Woods v. Russell*, 5 B. & Ad. 942; *Wood v. Bell*, 5 E. & B. 772. For the defendants it was contended that the contract upon which the question now arises was not a contract for the sale of goods, nor one capable of being so dealt with, as regards any part of it. They maintained that it was, in substance, a contract for work and labor, to be done upon two ships belonging to the plaintiffs and containing provisions wholly inconsistent with the view that the property in any part of the boilers and machinery intended for the boats would pass, until actually fixed on board. Denman, J., in deciding the case, *inter alia*, said: "We are of opinion that, upon the true construction of the contract, it was, as contended by the defendants' counsel, substantially a contract for work and labor to be done by the defendants for the plaintiffs, and that, looking to the complicated nature of the work to be done, it is impossible to hold that the provisions as to payment were intended to have the effect of passing the property in each portion of the work, certified by the inspector as properly done, to the plaintiffs as and when his certificate was given. If indeed we could not see anything upon the face of the contract to show that the two sums of 2,000*l.* were to be considered, as between the parties, to be in payment of the work certified to be done, neither more nor less, we should be disposed to hold that the plaintiffs' contention was well founded; but we do not think that this was the intention of the contract. We think that the two payments of 2,000*l.* were intended only to be made as payments on account of the contract to be performed as a whole, and that they were not intended to appropriate so much money to so much work or materials. The case finds that, at the time at which the defendants were informed of the loss of the *Scanderia*, 71 per cent of the whole work contracted to be done had been completed; and it is difficult to see what more could have been done beyond what would have been included in the first two certificates, until the ship had come into the defendants' hands. 71 per cent. of 5,800*l.* amounts to 4,118*l.*, a sum materially in excess of the 4,000*l.* paid, and we think it can hardly have been in contemplation of the parties that in any case the defendants should be bound to a portion of the work contracted for and hand it over to the plaintiffs for less than its proportionate value of the whole work to be done; and that, too, without receiving the old materials (worth 353*l.*), which they were to receive in case the contract had been fully performed."

A careful perusal of the specifications seems to us to establish that the contract was for one entire job, for which 5,800*l.* was to be received on one side and 353*l.* value in old materials on the other. The full performance of this contract having been rendered impossible by the loss of the *Scanderia*, we think that the plaintiffs can not maintain that any property has passed, and that therefore the claim in detinue fails.

"The second ground upon which the plaintiffs rested was a claim to be repaid the two sums of 2,000*l.* paid by them, as money had and received. With regard to the first of these sums it seems to us to be clear that it was paid in pursuance of the contract, and under such circumstances that the parties could not be placed in *status quo* by its repayment. The boilers certified to be plated may have been either of more or less value than 2,000*l.*, or of more or less profit or loss relatively to the subject-matter of the contract. The defendants are guilty of no wrong in not having fitted the boilers in question to the plaintiffs' ship. It seems quite plain that if the ship had perished during the currency of the bill at four months given for the second 1,000*l.* payable upon the plating of these boilers, that would have been no answer, as between the parties, to an action on the bill. With regard to the second 2,000*l.* there is a still further objection to its recovery in an action for money had and received. Before the plaintiffs paid that sum to the defendants, they were aware of the loss of the *Scanderia*, and the defendants were not aware of it. It can not, therefore, be maintained that it was paid by the plaintiffs upon a consideration which has since failed; for it was paid with knowledge of the facts which were unknown to the defendants.

"We are therefore of the opinion that the plaintiffs have failed to sustain either of the grounds upon which alone they contended that any right of action against the defendants could be supported, and that we are bound to give judgment for the defendants.

*Sale of Goods by Sample—Duty of Purchaser when Goods do not correspond with Sample—Rejection—Liability to return Goods to Seller.*—*Grimolilby v. Wells.* 44 L. J. R., 202. Common Pleas. The facts of the case sufficiently appear in the opinion of the court. The question involved is of interest, as it has been before the court but in few instances. In deciding the case, Lord Coleridge, C. J., *inter alia*, said: \* \* "The action was brought to recover the price of a quantity of tares which had been sold by the plaintiff to the defendant by sample, and which were found to be not equal to the sample. They were sent in bulk half the distance between where the plaintiff and the defendant lived, and there met by the defendant's cart, into which they were put and taken by that cart the other half of the distance, and then put into the defendant's barn. On the same day on which they were so delivered, and, therefore, without any delay, the defendant inspected them and found they were not equal to sample, and on that same day he wrote to the plaintiff. Now, when a person has goods sold and delivered to him which he seeks to reject, he must do nothing to them by

which he would be exercising a dominion over them, or he would be interfering with the right of the person who sold them. Then did the defendant, who is the appellant in this case, do such thing to these goods? No; for he simply did nothing to them. Then did he do all that was necessary to signify to the seller his rejection of them? He did, I think, do so in substance, and he did it in due time. He said he would not have them or pay for them, and that the plaintiff might do what he liked with them. That being so, the second point made by the county court judge arose. It seems that the learned judge thought that under these circumstances it was the duty of the purchaser to actually return the tares in point of fact, and that it was not sufficient for him merely to say that they were there, and that he would not have them. It is admitted that there is no authority for this proposition in law, unless the case of *Couston v. Chapman* (Law Rep., 2 Scotch App. 250), be such authority. The decision in that case, so far as I understand it, appears to be perfectly right, but no such meaning should be attributed to it, as the learned county judge seems to have attributed. All that was meant by it was that there must be some unequivocal act by the purchaser to show that he does not take the goods, and that what was done by the purchaser in that case was very slight, and was not enough for that purpose. It is true that the head-note in the report of that case would seem to show that it is the duty of the purchaser, when the goods are not conformable to sample, to place them in neutral custody, if the vendor does not acquiesce in thus being at his risk and disposal, but that does not appear to have formed any part of the judgment, and what the learned lords must have meant by what they said, was, that if the purchaser had done that, it would have been an unequivocal act of rejection of the goods by him. Thus in *Lucy v. Moufflet* (5 Hurl. & N. 229), both Baron Martin and Baron Bramwell expressly state that it is not necessary for the purchaser to send back the article which he has rejected. In that case there had been a sale of a quantity of cider, and the question was whether using a larger quantity of it than was necessary for the mere purpose of testing it, had, under the circumstances of that case, taken away the purchaser's right to reject it. The court of exchequer thought it had not, and Baron Martin stated that "the cider was sold with a warranty. The article supplied did not answer the description by which it was sold, and the defendant had a right to reject it or to keep it, and claim a reduction of price. This cider was contained in a large cask which was sent to London from Herefordshire. It would have been unreasonable to send it back to the country. It is the duty of a vendor, who has notice sent to him by his customer that an article is not in accordance with a warranty, to take it away or to come to some arrangement with the purchaser."

Baron Bramwell said: "I think that a vendee is not bound to return goods sent to him which are not according to warranty. But he is not in general at liberty to take more than a reasonable quantity for the



purpose of trying them." And Baron Channell substantially agreed with this.

Therefore, there is a direct authority for saying that it is not necessarily the duty of a purchaser to return goods physically when they are not equal to the sample, and I think that there is nothing unreasonable in this. I understand the learned county judge to have left to us the question whether he was bound to have found that the law imposes that duty on a purchaser, and as the county court judge found affirmatively that it does, I think that he was wrong, and that his decision should be reversed.

*Damages—Contract—Benefit accruing from Breach of Contract can not be taken in Mitigation—Profit arising from Breach to come out of Several Contractors.*—*Jebson et al. v. The East and West India Dock Company.* 44 L. J. R. 181, Common Pleas. The points involved in this case appear in the following portion of the opinion of Durman, J.: There were two lines of steamers from Norway to America, called respectively the Nordske Lloyds and the Nordske American lines. The Peter Jebson belonged to the Nordske Lloyds. She was under contract to carry emigrants and merchandise from Bergen to New York at the time when she was detained in the defendants' dock; and in order to fulfil her contract she ought to have been at Bergen at the end of June or the beginning of July, 1872, so as to start from Bergen as she had been advertised to do on the 4th of July. Sufficient notice of this contract had been given to the defendants to make them liable for the loss occasioned to the plaintiff by the breach of it, if, as was the fact, the defendants' conduct caused that breach; and the loss is to be taken for the purpose of our judgment at 1444*l.* 14*s.* 6*d.* It is said, however, that the plaintiffs have not sustained these damages in fact, and that, therefore, in law they are not entitled to retain them. The Peter Jebson, as has been said, belonged to the Nordske Lloyds line. There were two other steamers, the Harold Harfager and the St. Olaf, which belonged to the Nordske American line. The 240 emigrants who were booked for America by the Peter Jebson, were indeed lost to her, but 202 of them went to America on the 10th of July by the Harold Harfager, and twenty-five more of them went to America on the 16th of August by the St. Olaf; it is as to these that the substantial question arises. The two lines of ships which have been mentioned are associations of ships and not of owners. There is one body of directors and one set of laws for each of the lines respectively; but the owners in each ship in each line are not the same. Each ship has its own set of owners, and the same man may be, and in fact is, part owner in various proportions of different ships in different lines. In the instances of these particular ships the facts were these: The Peter Jebson was divided in 192 shares and the twelve plaintiffs owned them; the Harold Harfager was divided into 360 shares, which were owned by thirty-three owners, and five of these thirty-three were five of the plaintiffs; the St. Olaf was divided

into 300 shares, which were owned by twenty-six owners, and five of these twenty-six were five of the plaintiffs, but not all the same five as were part owners in the Harold Harfager. Now, it is said the Harold Harfager and the St. Olaf profited by the loss of the Peter Jebson; they carried emigrants whom they would not have carried but for the detention of the Peter Jebson. Some of the plaintiffs, therefore, gained by the default of the defendants, and such gain to individual plaintiffs, which, though, perhaps, with difficulty, is capable of being ascertained, must be taken in reduction of the damages, which the whole body of plaintiffs is entitled to. The statement of such a proposition in the bare simplicity is, perhaps, a sufficient answer to it. We need not insist upon the difficult and complicated enquiries, which in a multitude of easily suggested cases (some were suggested in the ingenious argument before us) would render any result arrived at by the jury practically impossible. The absence of authority for a claim by defendants like this, which yet, if well founded, must have arisen in many cases, is a strong presumption against its having any legal foundation; it is true that there must be a first instance of every claim, and that ingenuity often for the first time suggests a point which has escaped observation, and which yet when brought to the test of argument is found to be a sound one; but this is a point which must have arisen so frequently that it is to us incredible that if sound it never should have been taken. The contention of the defendants is not, however, only without authority; it is against the principle of cases decided under analogous circumstances. It should seem that if there had been but one owner of the Peter Jebson, and the same person had been sole owner of the Harold Harfager and of the St. Olaf, the profits made by him as owner of the two latter could not be deducted from the damages sustained by him as owner of the former. *Yates v. White* (4 Bing. N. C. 272; s. c. 7 Law J. Rep. (N. S.) C. P. 116), decided that a defendant in a collision case could not deduct from the amount of damages to be paid by him a sum of money paid to the plaintiff by insurers in respect to such damage. It may be said that the authority of this case is not direct, because the insurance was a contract of indemnity and the insurers might have recovered over from the plaintiff; the decision in the case, however, and that of *Mason v. Sainsbury* (3 Dougl. 61)—itself cited with approbation in *Yates v. White*, both stand on grounds independent of this consideration. But whatever weight may be due to it, the case of *Bradburn v. The Great Western Railway Co.* (Post, Excq. 9; s. c. Law Rep. 10 Exch. 1), cannot be so qualified. That was an action for injuries in a railway accident. It was held that in estimating the damages the defendants could not take into account the amount which the plaintiff received from an accidental assurance company; there the contract was not one of indemnity. The judges held that the contract into which the plaintiff had entered was that in consideration of the payment of premiums, he,

the plaintiff, should, on the happening of a certain event, receive a sum of money. The event happened, and the benefit of the contract accrued to the plaintiff through the defendant's default. But the benefit could not be deducted from the damages, for which the defendants were liable. This case appears to us to be perfectly well decided, and to be in point against the defendants in the case before us.

Furthermore, although not in form it is in substance, an attempt to set-off against joint damage, a several benefit. We are told by Mr. Bowen, in a very able argument, that he relied upon a distinction, which no doubt exists—but which we think will not avail the defendants—between partnerships and corporations. For the purposes of actions for breach of contract, part-owners of ships are in the same position as partners, and where a partnership sues for breach of contract the damages must be confined to those sustained by the partnership; the joint damage only can be considered. It seems to follow that any benefit arising out of the breach of contract—assuming that it can be taken at all into account in reduction of damages—must be a joint benefit, or one accruing to the partnership. In the case which was put in argument, of a gang with whom a joint contract had been made being dismissed in breach of it, it is clear the gang can sue. It was held, in the case of *The Tunbridge Wells Dipper Co., Weller v. Baker* (2 Wils. 414), by Lord Chief Justice Wilmot and the Court of Common Pleas (see the 4th point of the judgment, p. 423), that if a stranger disturbed them in their employment, they were all jointly concerned in point of interest and could all jointly sue in an action on the case.

It follows that only something in which the benefit was joint, could, if anything could, be considered in reduction of damages. If the matter now attempted to be set off in substance, were a set-off in form, there would be no room for the defendants' contention; for a joint debt can not be set off against a separate demand, nor a separate debt against a joint one. The benefit here, as it is a gain from third parties, is not a set-off; but the same rules of sense and convenience apply as if it were.

## Notes.

HON. JOHN F. DILLON.—We bind with this number of the REVIEW an excellent portrait of Hon. John F. Dillon, judge of the United States Circuit Courts for the Eighth Judicial Circuit. This portrait was made for us by James R. Osgood & Co., of Boston, by what is known as the heliotype process. We are not familiar with the details of this process, but, as its name indicates, its principle is similar to that of photography. As the printing by this process is done by the sun, it is possible to produce an accuracy of expression and fineness of detail which no engraving can equal.

Judge Dillon was born in Washington county, New York, December, 25, 1831; he is now, therefore, forty-four years of age. In 1838, when he was little over seven years old, his parents removed to Davenport, in the then territory of Iowa. He has resided there continuously ever since—a period of over thirty-seven years. His love of study and of books has been remarked from an early period. He commenced the study of medicine at seventeen years of age, attended two courses of medical lectures, and graduated in medicine when about twenty years old. He commenced the practice of medicine, but finding that it did not accord with his tastes, he began reading law in the office at which his sign as a physician was displayed. Soon afterwards, and while continuing to read law, with a view to aid in the support of his widowed mother, he engaged for a short time in business as a druggist, but closed it out when he considered himself fitted for admission to the bar. He was admitted to the bar of Scott county, Iowa, in 1852, and at once commenced the practice of the law, and soon became a member of the law firm of Cook & Dillon, and subsequently Cook, Dillon & Lindley—the latter gentleman being the estimable and able judge of that name who now holds a circuit judgeship in the city of St. Louis.

These firms did an extensive business at home and on the circuit—among the largest of any in the state.

In 1852, the year of Judge Dillon's admission to the bar, he was elected prosecuting attorney for Scott county, of which the annual salary was the extraordinary sum of \$250. He declined a re-election.

In 1858, when twenty-seven years of age, Mr. Dillon was elected by a majority greatly exceeding the majority of his party, as the republican candidate for judge of the Seventh Judicial District of Iowa—a district then composed of the four populous counties of Scott, Muscatine, Jackson and Clinton. The first work he did after his election, was giving a close and

critical study to all the then reported decisions of the supreme court of the state. This resulted in the preparation of his first legal work—a Digest of the Decisions of the Supreme Court of Iowa. At the expiration of his first term of four years as district judge, he was re-elected without any opposition; the bar of the district, *without distinction of party*, uniting in a request to him to continue in the office. Before his second term expired he was nominated by the republican party of that state for one of the judges of the supreme court, and elected for a term of six years, taking his seat January 1, 1863. He was in 1869 unanimously re-nominated for another term of six years as judge of the supreme court, and re-elected without any considerable opposition. But before he qualified under his second election, and while he was holding the office of chief justice of the supreme court, he was nominated by the President and confirmed by the senate, to be the Circuit Judge of the United States for the Eighth Judicial Circuit, embracing the states of Minnesota, Iowa, Nebraska, Missouri, Kansas and Arkansas.

During the time he was on the supreme bench of the state, he commenced collecting data for a work on Municipal Corporations. Having become bound to the publishers to prepare the treatise, he was compelled to *write out* the book after his accession to the federal bench. His great capacity for labor and endurance are shown in the fact that this entire work was written by his own hand in such brief intervals as he could snatch from the drudgery of his numerous courts, during the period of two years. His only assistant was his honored wife, who arranged the manuscript. This work had an extraordinary sale. The first edition of 2,500 copies, published in the year 1872, was exhausted in a few months, and the second edition, expanded into two volumes, is already nearly gone.

In the fall of 1873 Judge Dillon suggested to the present publishers of the REVIEW the desirability of having a first-class law journal published in the Mississippi valley. This suggestion resulted in establishing the *Central Law Journal*, of which, after much hesitancy, he was induced to assume the editorial charge. The general plan of the *Journal* was sketched by Judge Dillon, and much of the matter was for a time contributed by him; but in the multitude of his official duties, he found himself unable to give to its supervision that attention which it necessarily exacted of him, and at the end of the year he committed the management of it to his associate, the present writer.

During the seventeen consecutive years of judicial labor, Judge Dillon's robust health has enabled him to hold out without missing a single term of court on account of sickness. A constitution less vigorous could not endure the fatigues of his present position. He has held thirteen terms of court every year, for the last six years, in seven judicial districts and six states. His annual travel in his circuit to these various terms is over ten thousand miles. In addition to his other labors he

has edited and published two volumes of Circuit Court Reports, mostly his own opinions, and volume three is now in press. He also delivers each winter, a course of lectures on medical jurisprudence, to the combined law and medical classes of the Iowa State University.

In the spring of 1875 he was urged by Mr. Justice Miller, from considerations of health, to cease work and to rest by going to Europe—that eminent and kind-hearted judge offering to do, meanwhile, Judge Dillon's circuit duty. Accordingly, in May he went and visited the principal countries of Europe. While there, he was elected a member of the Association for the Reform and Codification of the Law of Nations, and in September he attended the third annual conference of that eminent body of men, which was held at the Hague. In October he returned in full health, and in four days he was in his courts, pressing forward into the life of toil which lay before him.

In 1853, Judge Dillon married a daughter of Hon. Hiram Price of Davenport. He has two sons and two daughters. His oldest son, Hiram Price Dillon, graduated last summer at the law school of the University of Iowa, and is now a member of the Davenport bar, and bids fair to travel worthily in the steps of his father.

Judge Dillon's opinions on the State Supreme Bench may be found in the twelve volumes of Iowa Reports, from volume 15 to volume 28. During this period the judges adopted and rigidly maintained the habit of consulting thoroughly upon every case before the opinion was written. These consultations extended to an agreement upon the facts of the case, upon the judgment to be rendered, and upon the grounds on which the judgment should be placed. This system of voluntarily enforced discipline could not fail to be productive of important results. During this period the Supreme Court of Iowa was truly a great court, and its decisions acquired a high standing throughout the Union, and carried with them at home the additional weight which attaches to a consideration of the fact that an opinion which purported to be the opinion of the court was indeed so, and not the opinion of a single judge. Some of the most careful work of Judge Dillon's judicial life is embodied in these reports; but his reputation, perhaps, rests more upon his legal writings than on his judicial labors. He has often expressed surprise at this; but it is not a matter of surprise, when we reflect that the same fate has attended the fame of Blackstone, Kent, Story, and other of his great predecessors.

In these published evidences of his labors he has built a monument which will perpetuate his name as long as American jurisprudence shall last, and which will constitute his chief title to the gratitude of his countrymen. But those who have known him more intimately, and particularly the younger members of the bar who have practiced in his court, will prefer to remember him for that uniform sweetness of temper and goodness of heart which do not fail him under the most trying circumstances.

The example of such a man—his youth nurtured in a wilderness—self-educated—struggling up under difficulties such as weigh down and discourage most young men—is well worthy of imitation by the youth of his country. America has produced few if any jurists who, surrounded by the same difficulties, have, at so early a period in life, attained to so eminent a position. And yet minds of his broad and independent cast are oftener

“ . . . nourished in the wild,  
Deep in the unpruned forest,”

than in sumptuous mansions, famous schools, great libraries, or art galleries. It is the fate of the older and wealthier communities that they produce men more cultivated, but less great. The lesson which the young men of our country may derive from such an example is this: If you will act your part as well as he has acted his—if you will devote yourselves to the occupation of your choice as steadfastly and honestly as he has devoted himself to his—although you may not go as far or achieve as much as he has done, yet you may equally with him enjoy the satisfaction of knowing that your countrymen have been honored and benefited by the fact that you have lived among them.





# INDEX.

## VOLUME I.—NEW SERIES.

A Curiosity, text of the opinion of the Supreme Court of Kansas in <i>Searle v. Adams</i> , . . . . .	180
Adoption; effect of law of, upon rights of inheritance. By Simon Obermeyer, Esq., . . . . .	70
An ancient lawsuit, . . . . .	397
After-trial advocacy, . . . . .	586
A Rehearing; case of the Chicago justice who consults with the spirits of departed jurists, . . . . .	187
Atheists, testimony of, . . . . .	179
Bar, the, and the growth of the law. By Prof. Emory Washburn, 672 Beecher, Rev. H. W.; case of Tilton against; legal aspect of. By John F. Baker, Esq., . . . . .	288
Bench and Bar of the South and Southwest; articles by Hon. Henry S. Foote, . . . . .	97, 247, 556, 685
Bishop on the Law of Married Women, . . . . .	789
Brevity in the Reports; the desirability of having causes briefly reported, illustrated by some French decisions. By Hon. U. M. Rose, . . . . .	333
Christ, legal aspects of the trial and crucifixion of; was he legally tried and condemned, . . . . .	188
Civil Rights Law, constitutionality of. By Hon. Wm. Archer Cocke, . . . . .	193
Choate; a comparison between Erskine and Choate, . . . . .	190
Citations in Pennsylvania cases, . . . . .	395
Code Pleading; notes on. By Hon. P. Bliss, . . . . .	459
Coke, Sir Edward, character of, . . . . .	107

Compromise verdicts, . . . . .	393
Conflict of laws ; recent decisions upon private international law,	363
Contempt, power of judges to commit for, . . . . .	398
Contracts, laws impairing the obligations of. By Robert Hutch- inson, Esq., . . . . .	401
Contributions to the history of the Roman Law in England. By John Edwards Leonard, LL. D., . . . . .	433
Cooper's Tennessee Chancery Reports, . . . . .	783
Damages for Injuries resulting in Death. By G. W. Field, Esq.,	703
Death, damages for injuries resulting in, . . . . .	703
De Colyar on Guaranties and Principal and Surety, . . . . .	165
Dillon, Hon John F. ; sketch of, . . . . .	806
<i>Donationes Mortis Causa.</i> . . . .	145
Drainage ; responsibility of municipal corporations for imperfect drainage and sewerage. By Henry E. Mills, Esq. . . . .	210
Early French Bar, the. By Hon. U. M. Rose, . . . . .	613
English decisions ; a summary of recent English cases. By George M. Stewart, Esq. . . . .	512, 796
Equity ; differences between law and equity. By Hon. Francis Hilliard, . . . . .	86
Erskine ; a comparison between Erskine and Choate, . . . . .	189
European and Oriental Jurisprudence ; on certain distinctive characteristics of, . . . . .	369
Executory Devices ; some remarks upon. By Hon. Thomas J. Freeman, . . . . .	438
Federal Courts, the. By Gustavus Schmidt, Esq., . . . . .	544, 748
Fortescue's <i>De Laudibus Legum Angliæ</i> , . . . . .	151
Fox's Libel Act. . . . .	139
French Bar ; the Early French Bar. By Hon. U. M. Rose, . . . . .	633
French Decisions ; several quoted as showing the desirability of brevity in the reports of judicial decisions. By Hon. U. M. Rose, . . . . .	333
German Law ; notes of current German law. By Prof. Wm. G. Hammond, . . . . .	653
Herman on Executions, . . . . .	383

Infants ; liability of infants and persons of unsound mind for their torts. By Timothy Brown, Esq., . . . . .	34 <sup>6</sup>
Inheritance ; effect of law of adoption on rights of. By Simon Obermeyer, Esq., . . . . .	70
Injuries resulting in death ; damages for, . . . . .	703
Interest during the war, the question of, . . . . .	392
Japan ; a French school of Law in, . . . . .	122
Judgments of Sister States ; the collateral impeachment, by parties and privies, of judgments <i>in personam</i> of sister states, . . . . .	662
Judicial Power, Limitations of; considerations upon the power of courts of last resort to review and reverse their own decisions; the legal tender cases criticised. By Prof. Emory Washburn, . . . . .	354
Jurisprudence, European and Oriental ; on certain distinctive characteristics of, . . . . .	369
Jury Trials; considerations upon the system of trial by jury. By Hon. Seth J. Thomas, . . . . .	326
Lacey's Digest of Railway Decisions, . . . . .	168
Limitations of Judicial Power; considerations upon the power of courts of last resort to overrule and reverse their own decisions. The Legal Tender cases criticised. By Prof. Emory Washburn, . . . . .	354
Louisiana Case, the legal aspects of. By Hon. Thomas M. Cooley, . . . . .	18
Lowell, James M., trial of, . . . . .	391
Louisiana Circuit Judgeship; power of the President to fill by an <i>ad interim</i> appointment. . . . .	182
McCrary on Elections,. . . . .	775
Miller's Decisions, . . . . .	794
Miller's Iowa Pleading and Practice . . . . .	783
Mitchell, Separate Use in Pennsylvania, . . . . .	392
Modern Theories of Government. By Hon. Wm. F. Cooper, . . . . .	1
Morgan's De Colyar on Guaranty and Suretyship, . . . . .	165
Morgan on Literature, . . . . .	763
Municipal Corporations ; responsibility of, for imperfect drainage and sewerage. By Henry E. Mills, Esq., . . . . .	210

King's Bench ; the King's Bench and the growth of the law. By Prof. Emory Washburn, . . . . .	533
Newspapers ; responsibility of. By Edward McCrady, Jr. . . . .	233
<i>Non Compotes</i> ; liability of, and of infants for their torts. By Timothy Brown, Esq. . . . .	346
Obstructing and diverting water. By Melville M. Bigelow, Esq. . . . .	59
Ohio State Reports, Vol. 24, . . . . .	378
<i>Pacta illicita</i> , . . . . .	574
Pennsylvania cases, citations in, . . . . .	395
Private <sup>1</sup> International Law, recent decisions on, . . . . .	363
Professional fees; fees paid Serjeant Ballantine for defending the Guicowar of Baroda, and other instances of heavy fees, . . . . .	187
Proximate and Remote Cause; horse kicking another through boundary fence; liability of owner, . . . . .	186
Proximate and Remote Cause; liability of railroad companies for remote fires. By Francis Wharton, LL. D. . . . .	729
Railway Negligence; liability for remote fires. By Francis Wharton, LL. D. . . . .	729
Railway Passengers; right of, to suitable accommodations. By Charles A. Choate, Esq. . . . .	445
Recent English Decisions; summary of important cases recently de- cided in England. By George M. Stewart, Esq., . . . . .	512, 796
Remote Fires; Liability of railway companies for. By Francis Wharton, LL. D., . . . . .	729
Reporters and Text Writers, The; articles by Franklin Fiske Heard, Esq., showing the standing of various reports, re- porters and judges, as estimated by subsequent judges and writers, . . . . .	86, 223, 497
Roman Law, the place of, in legal education. By W. A. Hunter, from Law Magazine and Review, . . . . .	122
Roman Law, the, and the Grangers, . . . . .	396
Roman Law, early history of, in England, . . . . .	433
Sawyer's Reports, Vol. 2, . . . . .	159
Sedgwick on Statutory and Constitutional Law, . . . . .	375
Sewerage, responsibility, of municipal corporations for imperfect drainage and. By Henry E. Mills, Esq., . . . . .	210

St. Leonard's, Lord, sketch of, . . . . .	175
Surface and Subsurface Water; obstructing and diverting. By Melville M. Bigelow, Esq., . . . . .	59
Tennessee Chancery Reports, . . . . .	779
Tilton's Case, . . . . .	592
The legal aspects of the great crim. con. case. By John F. Baker, Esq., . . . . .	288
Trespass; liability for injury inflicted by horse kicking mare through boundary fence; remoteness of damages, . . . . .	186
Trial by jury; considerations upon the system of. By Hon. Seth J. Thomas, . . . . .	326
Vacancies in Office; power of the President to fill by <i>ad interim</i> appointment, . . . . .	182
Waite, Mr. Chief Justice; opinion of, in Pollard v. Bailey com- mented upon, . . . . .	45
Water; obstructing and diverting surface and sub-surface water. By Melville M. Bigelow, . . . . .	59
Wharton on Homicide, Second Edition, . . . . .	390, 595
Wharton on Negligence, . . . . .	162
Whitman's Patent Cases, Vol. 2, . . . . .	791
Waterman on Trespass, . . . . .	386
Wood's Circuit Court Reports, Vol. 1, . . . . .	792



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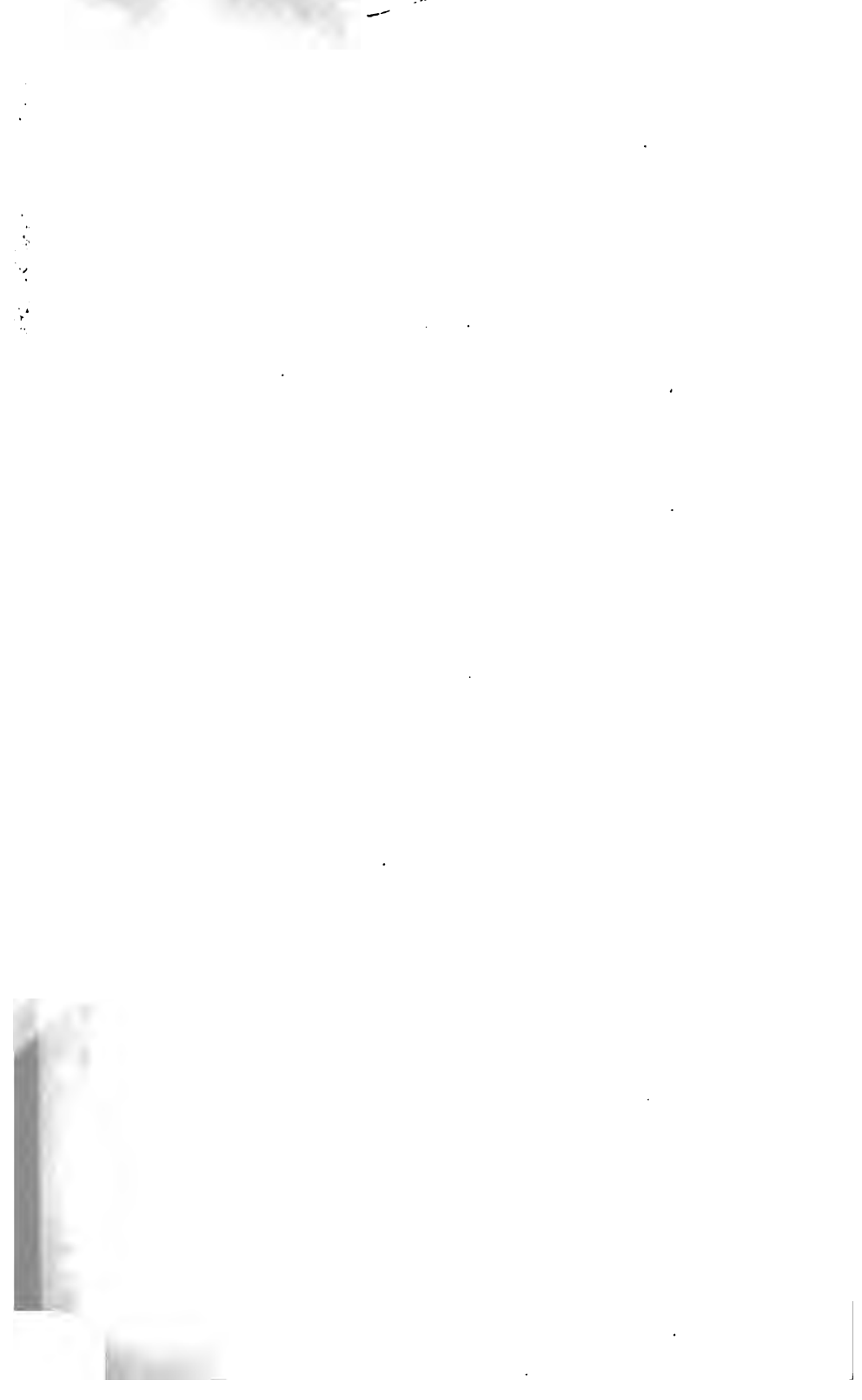
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